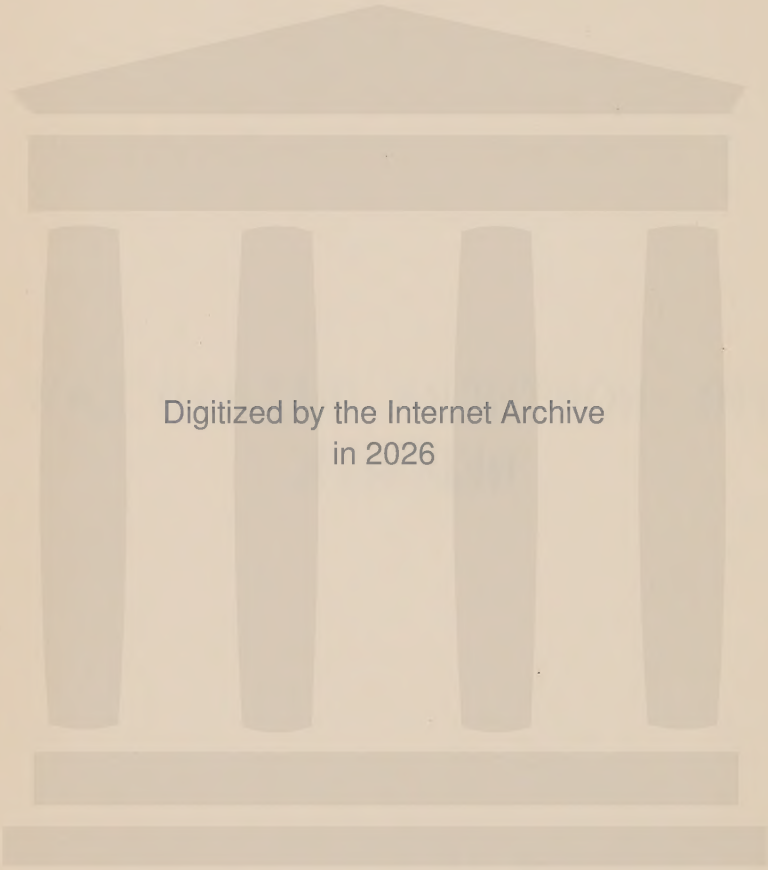
THE NORTHERN IRELAND LAW REPORTS.

1929.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THE NORTHERN IRELAND LAW REPORTS

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

EDITED BY

MARCUS D. BEGLEY, Esq., K.C.,

ONE OF HIS MAJESTY'S COUNSEL

1929.

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Lord Chief Justice.

THE RIGHT HON. WILLIAM MOORE.

Lords Justices of Appeal.

THE RIGHT HON. JAMES ANDREWS.

THE RIGHT HON. RICHARD BEST.

Chancery Division.

THE HON DANIEL MARTIN WILSON.

King's Bench Division.

THE RIGHT HON. WILLIAM MOORE.

THE RIGHT HON. THOMAS WATTERS BROWN.

Judicial Commissioner Land Purchase Commission.

ROBERT D. MEGAW, K.C.

Attorney General.

THE RIGHT HON. ANTHONY BRUTUS BABINGTON, K.C.

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JOHN D. CONDY, Barrister-at-Law.

[These Reports will be cited as follows:—[1929] N.I.]

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CASES

DETERMINED BY

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

K.B.D.
1928.

June 15

CALLAN AND ANOTHER v. M'KENNA AND ANOTHER (1).

[1928. No. 1440.]

Practice—Security for costs—Plaintiffs resident in Irish Free State—R.S.C., 1905, *Order* 29 *r.* 1—*Judgments Extension Act*, 1868 (31 & 32 *Vict.*, *c.* 54).

Application on behalf of defendants resident in Northern Ireland that plaintiffs, who resided in the Irish Free State, might be ordered to give security for costs on the ground that in the event of defendants obtaining judgment, they would be unable to have it extended in the Irish Free State, as the Judgments Extensions Act, 1868, no longer applied to that country.

Held by Moore, L.C.J., that plaintiffs must give security for costs. Wakely v. The Triumph Cycle Company, Limited [1924] 1 K.B. 214 followed.

SUMMONS under Order, 29 r. 1, brought by Joseph M'Kenna and Mary Elizabeth M'Kenna, the defendants in an action for the recovery of £250, money lent, for an order that the plaintiffs, Annie Callan and Kate Callan, who resided at Seatown, Dundalk, in the County of Louth, in the Irish Free State, might be ordered to give security for the costs of the action.

(1) In the King's Bench Division before Moore, L.C.J.

K.B.D. 1928.

CALLAN v. M'KENNA.

MacDermott for the defendants :—

The Judgments Extension Act, 1868, does not now apply to the Irish Free State, *Wakely* v. *The Triumph Cycle Company, Limited* (1), and consequently a person residing in the Irish Free State is in the position of a foreigner, and should be ordered to give security for costs for that reason alone.

[Moore, L.C.J. : Are judgments of this court not extended in the Irish Free State as a matter of practice following the principle laid down in the Free State case of *Gieves* v. *O'Conor* (2)?]

Gieves v. *O'Conor* (2) is opposed to the decision of the English Court of Appeal in *Wakely's* case, and is, I submit, wrongly decided. The practice in this jurisdiction has always followed *Wakely's* case, and whatever may be the practice in the Irish Free State at present, the defendants in this action have no certainty of being able to extend their judgment in the Irish Free State should a verdict be found in their favour.

[He also referred to *Banfield* v. *Chester* (3).]

Black for the plaintiffs :—

Under the existing practice English judgments are extended in the Irish Free State, *Gieves* v. *O'Conor* (2). Accordingly the defendants could have their judgment extended in the Free State in the event of the action terminating in their favour. This being so the plaintiffs should not be required to give security for costs.

MOORE, L.C.J. : I see no reason to differ from the decision of the Court of Appeal in *Wakely* v. *The Triumph Cycle Company Limited* (1). The plaintiffs must give security for the costs of the action, and the costs of this summons will be costs in the cause.

Solicitors for the plaintiffs :—*Dickie, Coulter and Hamill.*

Solicitor for the defendants :—*Thomas Elliott.*

J.D.C.

(1) [1924] 1 K B. 214.
(2) [1924] 2 Ir. 182.
(3) 94 L.J. (K B.) 805.

ESTATE OF RICHARDS (1).
(N.I. 693.)

Jud. Commr. 1928.

July 13, 17

Land purchase—Standard purchase annuities—Judicial and non-judicial tenancies—Judicial rents—Reduced rents accepted by landlord for long period—Tenancies described in provisional list as being non-judicial and subject to the reduced rents—Objection by owner—Northern Ireland Land Act, 1925 (15 & 16 *Geo.* 5, *c.* 34).

The owner of an estate (to the holdings in which the Northern Ireland Land Act, 1925, applied) had, since about the year 1910, allowed the tenants on his estate abatements of 15 per cent. of their rents. In the particulars served by the owner under Section 17 of the Act some of the tenancies were stated to be subject to judicial rents and the remainder were described as non-judicial. The rents set out in the particulars were, in the case of the judicial tenancies (the statutory terms having expired) the judicial rents fixed by the Land Commission or by agreements filed, while in the case of the non-judicial tenancies the rents were some 15 per cent. more than the actual payments normally made by the tenants. The Land Commission in preparing the provisional list did not accept these particulars, and all the tenancies were therein described as non-judicial, and as being subject to rents which were 15 per cent. less than those set out in the owner's particulars.

Held, that as there had been no binding agreements to accept reduced rents, the rents set out in the provisional list should be amended so as to agree with the particulars furnished by the owner.

MOTION for an order amending the provisional list.

The estate of John R. H. Richards was an estate to which the Northern Ireland Land Act, 1925, applied. The particulars served by the owner under Section 17 of the Act were given on the hypothesis that of the 152 tenancies, 69 were subject to judicial rents, some first term, some second term and a few third term, and that the remainder were non-judicial. The rents set out in the particulars were, in the case of the judicial tenancies, the judicial rents fixed, while in the case of the non-judicial tenancies the rents were some 15 per cent. more than the actual payments normally made by the tenants. The Land Commission in preparing the provisional list did not accept these particulars, and the tenancies in all cases were therein described as non-judicial, and the rents set out were in all cases 15 per cent. less than those mentioned in the particulars. An objection to the provisional list

(1) In the Court of the Land Purchase Commission before Megaw, K.C., Judical Commissioner, and Wilson and Macoun, Land Purchase Commissioners.

Jud. Commr. 1928.

ESTATE OF RICHARDS.

was served on the Land Purchase Commission, dated 18th May, 1928, and received by direction of the court on 22nd May, to the effect that the provisional list should be amended so as to agree with the particulars served, and this was followed by a formal notice seeking in more regular terms the same relief.

It appeared from evidence adduced on behalf of the owner that about 1909 or 1910, as the result of some representations made by the tenants, the owner had in fact given abatements in all cases, which practically from that date became an established rule, and the rent payers, whether judicial or non-judicial, when rents were paid without process of law were given a full receipt on payments of amounts 15 per cent. less than the then existing rents.

By his affidavit William T. Biller, the agent for the estate, averred that the abatements were voluntary, and were given annually for punctual payments.

Evidence was given on behalf of the tenants as to the circumstances in which the abatements were allowed.

Warnock for the owner:—The agreement to accept reduced rents could not be enforced for want of consideration. Proof of payment of an abated rent for 18 years is no answer to an action for the full rent: *Booth* v. *Daly* (1).

[He also referred to *Fitzgerald* v. *Lord Portarlington* (2).]

T. J. Campbell, K.C., and *McSparran* for a number of tenants:—We submit that the evidence points to a legal contract by the landlord to accept a reduced annual sum as the rent in each case. Apart from evidence of express contract the payment of an abated rent for many years is evidence of a new tenancy. It is a question of fact whether the allowances were made contractually or voluntarily, and we contend that they were not voluntary allowances. But for the compulsory purchase of the landlord's estate by the Land Commission, obviously it would not have been disputed that the reduced rents were the real rents.

Cur. adv. vult.

(1) 6 I.C.L.R. 460.

(2) 1 Jo. Ex Ir. 431.

Jud. Commr. 1928.

ESTATE OF RICHARDS.

July 17

The JUDICIAL COMMISSIONER, having stated the facts, continued :—

It was contended on behalf of the owner that the rents existing in the year 1909 remained legally payable as the tenancies then existing were not surrendered, and that there was no binding agreement to reduce the rents. Cases were cited where in the case of leaseholds long continued payment of an abated rent did not affect the liability for paying the full rent when such was demanded.

The tenants contended that in fact the rents set out in the provisional list were correct, and that it must be presumed from the acceptance of these reduced payments for so many years, that the rents now affecting the various holdings were those set out in the provisional list. Some weight was attached to the phraseology of Sched. III, Part II, Clause I, of the Northern Ireland Land Act, 1925, where the words "actual rent" are used.

Evidence was given by Hugh J. Stewart, one of the tenants who was tenant of two holdings, one described in the particulars as judicial and the other as non-judicial. He stated the circumstances in which the reduction was given, and he seemed to me to be an entirely truthful witness, and he was not cross-examined. The case for the tenants must depend upon Mr. Stewart's evidence, as the affidavit of Patrick M'Caffrey, put in at the hearing, is not convincing. He swore that the rent set out in the provisional list was the actual rent returned in his particulars by the landlord, a statement for which there is no foundation, and which was merely a reckless conjecture.

I am satisfied that if the reduction had not been given many of the tenants would have had recourse to the rent fixing provisions of the Land Law (Ireland) Acts, and it may seem inequitable that by reason of an amicable arrangement, the tenants are—at any rate in some instances—placed in a less advantageous position. However, we must administer the law as it exists, and after a very close examination of the facts proved I see no evidence to support the contention that any binding agreement was made to reduce the rents. It has been proved by ejectment decrees in some cases that where there was a failure to pay the rent without compulsion of the court, the unabated rent was demanded and recovered. Then,

Jud. Commr. 1928.

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we have the form of the receipts which must have made it clear to the tenants that the rents had not been permanently abated.

The argument based on the use of the words "actual rent" mentioned in Sched. III, Part II, Clause 1 of the Northern Ireland Land Act, 1925, seems to me to be double edged. It might be contended that it was the rent legally payable as distinct from the sum actually accepted just as strongly as it was contended that the sum so accepted was the "actual rent." In the Act itself the general term "rent" is used in different connotations. In Sched. III, Part I, we find the words "judicial rent" used in certain circumstances with a meaning that at times upsets first impressions. A first term judicial rent in fact may have to be treated as a second term judicial rent, and we have to look not to the fact of the rent being in fact first term, second term or third term, but to the dates within which the rent was fixed. In Part II of the same schedule dealing with non-judicial holdings we have the phrase actual rent which has got to be expressed in terms of judicial rents.

Clearly judicial and non-judicial holdings have to be dealt with differently. Mr. Hugh T. Stewart has one holding on which a judicial rent was once fixed, and another holding that was never subject to a judicial rent, and accordingly his cases may be regarded as test cases.

The first question to be determined is whether for the purposes of the 1925 Act any of the holdings should be regarded as judicial. In fact the statutory terms in such cases as fair rents had been fixed have all expired—but that is not conclusive. Section 3, sub-s.1, of the Land Law (Ireland) Act, 1896, enacts that on the expiration of a statutory term in a present tenancy, the tenancy shall continue a present tenancy subject to the same rent and conditions as during the statutory term, until the tenancy is determined, or a new statutory term begins. Surely Part I of Sched. III is meant to include such holdings when no subsequent statutory term has been created, otherwise there would be no meaning in the percentage column headed "First Term Judicial Rents; i.e., fixed before the 16th August, 1896." It seems to me, therefore, that unless something binding was done to determine the tenancy and create a new tenancy all holdings on which fair rents

were fixed must be regarded as holdings subject to judicial rents to be calculated for the purpose of the standard purchase annuity on the basis of the appropriate date on which the respective rents were fixed. *Bruce* v. *Jackson* (1) does not in any way conflict with this conclusion.

The question then arises; have the tenancies, existing when fair rents were fixed, determined and been replaced by new tenancies which in the eye of the Land Acts would be future tenancies? In my opinion the state of things disclosed by the evidence is entirely at variance with such an hypothesis. It is hard to conceive that present tenants would for the sake of casual abatements of rent surrender the status of present tenants for the precarious tenure affecting future tenants. Had the Northern Ireland Land Act, 1925, not passed I cannot conceive of such reckless abandonment of an assured status. Moreover I cannot see any evidence that would support a conclusion of the kind.

The oral evidence of Mr. Stewart is very far short of supporting any binding agreement. There were conversations between the representatives of the tenant and the agent—what took place between the landlord and agent we do not know, but we have very detailed evidence of the conduct of the parties given in the agent's (Mr. Biller's) affidavit which is quite consistent with all that Mr. Stewart has sworn.

In my opinion there is no evidence of an express contract to vary the rents legally payable in 1910, and I think the facts proved shut out the possibility of such a contract being implied.

As regards the other tenants on whose holdings statutory terms have not been created. I also fail to see any evidence which could justify a court in holding that the rents originally payable had been legally varied.

Believing as I do that the abatements were given from year to year so that the present tenants should not resort to the court to have new fair rents fixed I should gladly have come to a different conclusion as regards the present tenants. In the cases of the non-judicial holdings matters can be equitably adjusted on the lodging of objections under Part II of Schedule III. In my opinion the court in law is bound to hold that in all the cases before us there

(1) [1926] N.I. 192.

Jud. Commr. 1928.

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has been no valid reduction of the rents, and that the sums mentioned in the particulars furnished by the owner should be the rents set out in the provisional list.

If necessary, an extension of time must be given to such of the tenants as are to be regarded as non-judicial to object to the rents payable by them being regarded as second term judicial rents.

As matters stand there is no provision either by statute or rule that particulars of the rent, standard purchase annuity or standard price should be set out in the provisional list issued under Section 17, though Order XIII deals with cases where objection is taken to a non-judicial rent being treated as a second term rent when such holding appears in the provisional list, but the practice—and I think it is a convenient practice which is in process of being made regular has been to set these matters out. In any case, the rents must be ascertained before the price payable to the owner has been fixed and on the present motion we see no objection to making a decision that has got to be made at some time in the change of ownership.

After judgment had been given by the other Land Purchase Commissioners, dissenting from the above decision and expressing the opinion that the tenure and rents set out in the provisional list were correct, the Judicial Commissioner directed that, inasmuch as the question at issue was either a question of law, or a mixed question of law and fact, and that there was no evidence on which the opinion expressed by the other Land Purchase Commissioners could be sustained, the order of the court should be entered according to the judgment of the Judicial Commissioner.

The curial portion of the order was in the terms following:—

"It is declared that under the provisions of the Northern Ireland Land Act, 1925, the standard purchase annuities of all the holdings (i.e., Register No. 1 to Register No. 152 inclusive) should be calculated on the basis of the rents set forth in the said schedule of particulars as lodged by the said owner, that is to say, (a) that the holdings, Register Nos. 1-69 inclusive, are

holdings subject to judicial rents and that the provisions of Part I, Schedule III, of the Northern Ireland Land Act, 1925, are applicable thereto; (b) that the rents of such holdings are respectively the rents fixed by the last order made in respect thereof by the Irish Land Commission, or the last fair rent agreement in respect thereof filed in the Irish Land Commission; (c) that the standard purchase annuities in such cases should be calculated on the said rents pursuant to Part I, Schedule III, of the said Act; (d) that the rents of the holdings Register Nos. 70-152 inclusive are the respective amounts set forth in the said schedule of particulars as lodged by the said owner; (e) that the standard purchase annuities in respect of such holdings should be fixed in accordance with this declaration pursuant to Part II, Schedule III, of the said Act, but that no part of this declaration shall affect the rights of any subtenant who may have an interest in any of the holdings, and it is ordered that the time for lodgment of objections by non-judicial tenants to the treatment of their rents and applications for the fixing of annual sums be extended for two months from the date of this order."

Solicitors for the owner: *Alexander Irvine & Co.*
Solicitor for the tenants: *J. J. Little.*

J. D. C.

A number of the tenants appealed to the Court of Appeal.

Monroe, K.C., and *M'Neill* for the appellants:—We submit that the Judicial Commissioner was wrong in withholding the case from the two lay Commissioners. In *Lefroy* v. *Walsh* (1) it was decided that payment of an abated rent for thirty years, if unexplained, was evidence to go to a jury, of the creation of a new tenancy. This case was cited with approval in *Tennant* v. *Neil* (2). The question at issue was therefore a question of fact, and should have been decided by the three Commissioners.

Warnock for the respondent:—There is no authority which supports the suggestion that payment of an abated rent is evidence of the creation of a new tenancy unless

(1) 1 I.C.L.R. 311 (2) Ir.R. 5 C.L. 418

Jud. Commr. 1928.

ESTATE OF RICHARDS.

such abatement is unexplained. In the present case the abatements have been explained. I rely on *Conroy* v. *Marquis of Drogheda* (1), in which Walker, C., held that surrender by operation of law is based on intention.

[He also referred to—*Oastler* v. *Henderson* (2), *Crowley* v. *Vitty* (3), *Fitzgerald* v. *Portarlington* (4), *Re Smith & Hartogs, Ex parte Official Receiver* (5), *Lynch* v. *Lynch* (6), *Thompson* v. *Hagan*, (7), *Butler* v. *O'Mahony* (8).

Monroe, K.C. (in reply), referred to *Kelly* v. *Hamilton* (9).

The Court of Appeal (Andrews and Best, L J.J.) dismissed the appeal with costs.

Solicitor for the appellants : *James Cooper.*
Solicitors for the respondent : *Alexander Irvine & Co.*

J. D. C.

(1) [1894] 2 Ir. 27
(2) 2 Q.B.D. 575
(3) 7 Ex. 317
(4) 1 Jo. Ex. I., 431
(5) 73 L.T. 221
(6) 6 I.L.T.R. 131
(7) [1906] 1 Ir. 1
(8) 32 I.L.T.R. 93
(9) [1897] 2 Ir. 27.

[IN THE COURT OF APPEAL.]

C.A. 1928

GAUSSEN

v.

THE LOWER BANN NAVIGATION TRUSTEES (1).

Feb. 9, 10 May 2

(1926. No.81.)

Navigation of rivers and lakes—Drainage—Awards made under statutory powers for the promotion of the drainage of lands and the improvement of navigation—Works of navigation—Liability for maintenance of works—Construction of statute and award long acquiesced in—5 & 6 *Vic., c.* 89, *sects*, 3, 4, 8, 53, 54, 56, 106, 119, 120, 159; 18 & 19 *Vic., c.* 110, *sects.* 5, 14; 19 & 20 *Vic., c.* 62, *sects.* 1-5, 15, 24, 25, 26, 29.

In the year 1788, the predecessors in title of the plaintiff erected a pier at "B" on Lough N. to facilitate the work of loading and unloading lighters. In 1858, under statutory authority, the water level of Lough N. was lowered, the pier was extended, and the approaches by water to the pier were dredged.

In Schedule B to an award made under statutory authority in 1859 and entitled "Navigation undertaken in connection with drainage" were set out the works executed in the district of Lough N. which were to be maintained as works of navigation. No mention was made in this award of the pier or the approaches thereto.

In Schedule B to a second award made in the same year, were set out the several works which had been completed for the drainage and improvement of lands within the district of Lough N., including works of navigation and works in connection therewith.

In Schedule B (a) to this award were set out the works for the maintenance whereof as works of drainage, trustees were to be appointed. Amongst the works specified in Schedule B as having been completed were the extension of the pier, and dredging the approaches thereto. No reference to these works was contained in Schedule B (a).

The navigation and works belonging thereto in that portion of Lough N. in which the pier at "B" is situate are now vested in the defendants, who were incorporated under the provisions of 19 & 20 Vic., c. 62.

The defendants until 1911 carried out the necessary dredging operations, but in that year they ceased to do so, and have since repudiated all liability therefor on the ground that the navigation award contained no reference to same.

In an action by the plaintiff against the trustees for a declaration that they were liable to keep the entrance to the pier in a navigable condition:—

Held by the Court of Appeal (Andrews and Best L.J.J.), reversing the judgment of Brown J., that the defendants were liable to maintain the pier and approaches thereto in a proper and effective navigable condition.

Where there is a doubt as to the meaning of a statute or an award made thereunder, a construction placed thereon and long acquiesced in by all parties will not be departed from.

(1) In the Court of Appeal before Andrews and Best, L.JJ.

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APPEAL from the judgment of Brown J. The facts and the relevant statutes are fully set out in the judgments.

M'Gonigal, *K.C.*, and *Dougherty* (with them *Gaussen*, *K.C.*) for the plaintiff:—

Murphy, *K.C.*, *Megaw*, *K.C.*, and *Porter*, for the defendants:—

Cur. adv. vult.

May 2.

ANDREWS, L.J.: This action was brought for a declaration that the defendants are bound to keep and maintain the water passage and entrance to the pier and quay at Ballyronan, Lough Neagh, in a navigable condition, proper and effective to admit lighters carrying about 70-80 tons and of six feet draught to load and unload at the said pier and to come and go from alongside the pier at all times. The writ also contained a claim for a mandatory injunction and damages. The plaintiff is a trader carrying on business at Ballyronan. The pier was, it is alleged, erected in 1788 by the plaintiff's predecessor, David Gaussen, and was used by him and his successors in title for the purpose of loading and unloading lighters carrying goods and merchandise, and also by fishermen.

Between the years 1842 and 1857 several Acts of Parliament were passed to promote the drainage of lands in Ireland and the improvement of navigation and water power in connection with such drainage. The execution of the necessary works was entrusted by Parliament under the Act of 1842 to the Commissioners of Public Works in Ireland. Persons interested in the drainage of lands or the improvement thereof or in the navigation of a river in connection with drainage or the improvement thereof were by sections 3 and 4 of that Act authorised to proceed by memorial to the Commissioners, who were by section 8 empowered to appoint an engineer or other competent person to inspect and report upon (*inter alia*) as to whether any existing navigation would be injured by the works necessary to be executed for drainage, or whether any useful or necessary navigation would or might be effected or improved in conjunction therewith. By section 53 power was conferred upon the Commissioners by contract or otherwise to execute approved

works, making compensation in manner provided to all persons for any damage occasioned to them by the exercise of any such powers. The right of persons suffering injury to compensation is also recognised in sections 54 (since repealed) and 56. Section 106 provides that on completion of any works of drainage or navigation, the Commissioners should draw up an award which should describe the land or river drained or improved and the works which had been completed and the other matters therein specified, including the proportion in which the proprietors of lands should "in future be annually charged towards the costs and expenses which might from time to time be incurred in and about the maintaining, cleansing, and keeping in repair the works executed under the Act." Section 119 further enacts that where the navigation of any river should be improved under the Act, the Commissioners should "have and retain the *continued* care and conservancy of the several works which should be executed under the provisions of the Act." I may add that by section 159 the word "river" is so defined as to include "lakes." Section 120 provides for the appointment of drainage trustees, who were expressly authorised to make and maintain such works as they should think necessary for drainage, and to preserve the same, and the powers of the Commissioners under the Act are extended to such trustees.

The Act of 1855 (18 & 19 Vict., c. 110) contained in its preamble a recital that in connection with the drainage of lands in certain districts four navigations had been undertaken and in part executed, the first of which was described as being in the district of Lough Neagh, situate in the counties of Antrim, Derry, Tyrone, Armagh and Down, the navigation of the Lower Bann river from the Bridge of Coleraine in the tidal part of the said river to Lough Neagh, and extending thence to the first lock or entrance of the Lagan, Newry, Ulster and Coal Island canals. By section 5 of that Act it is provided that, on the completion of any of the navigation works, the Commissioners of Public Works should make an award specifying the total amount of costs, charges and expenses incurred in the making of such navigation, and showing the portion which was to be charged on counties, baronies and townlands. Drainage awards by the Commissioners were not to be

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affected by anything in the Act, and were to be made as if no work of navigation had been connected therewith (s. 7). Power was also conferred on the Commissioners to direct that the navigation should be deemed and become the property of the counties, after which such navigation, together with all locks, weirs and other works, should be deemed and taken to be the public property of such counties, and be held, maintained and preserved by the grand juries thereof (s. 8). Another important section of this Act is section 14, which enacts that the provisions of the Act of 1842, or any amending Act, as far as regards the appointment of trustees for the maintenance of works of drainage, and the several powers and authorities of such trustees when so appointed, should be held to apply equally to all works of drainage though a navigation may have been improved or formed in connection with such drainage.

In the following year, 1856, another Act of Parliament (19 & 20 Vict., c. 62) was passed "to provide" (*inter alia*) "for the maintenance of navigations made in connection with drainage." The preamble contained a recital that three of the four mentioned navigations (including that in the district of Lough Neagh) had been or shortly would be completed, and that it was expedient to provide for the due and proper maintenance and regulation of the said navigations, and for that purpose that such navigations should be vested in trustees. In furtherance of this object, and, as it appears to me, for the purpose of defining more clearly the extent of the Lough Neagh navigation, section 1 provided that that navigation should be divided into two; that one of such navigations should be called "Lower Bann Navigation," and should consist of the portion of the navigation which extends from the Bridge of Coleraine to Lough Neagh in the counties of Londonderry and Antrim respectively, including that part of Lough Neagh situate in the said last mentioned counties according to the boundaries of the said counties through the waters of the said lough as laid down on the ordnance survey; and that the other of such navigations should be called "Upper Bann Navigation," and should consist of the portion of the navigation which extends from Blackwater Town by the River Blackwater to Lough Neagh, including that part of the said

lough situate in the counties of Armagh, Tyrone and Down according to the boundaries of the said counties through the waters of the said lough as laid down on the ordnance survey. This section removed an ambiguity which undoubtedly existed under the Act of 1855, and made it clear that the Bann Navigation included the waters of Lough Neagh, portion of which, as ascertained and defined by county boundaries, fell within the Upper Bann section, whilst the remaining portion came within the Lower Bann.

Section 2—the vesting section—provided that (amongst others) these two navigations, together with all locks, weirs, and other works, rights, members and appurtenances thereto belonging, should, by virtue of that Act and from the date of the award of the Commissioners of Public Works under the Act of 1855, vest in the trustees for the time being incorporated under the Act of 1856 for such navigation for the use of the counties, baronies and townlands chargeable under such award, and should be held, maintained and preserved by such trustees subject to the provisions in that Act contained.

The works carried out in and near Lough Neagh and the River Bann were partly for drainage and partly for navigation purposes; and, as the policy of this drainage and navigation code was to entrust the maintenance of these respective works to different trustees, it became necessary to define in some manner into which category the several works fell. This was effected by section 3 of the Act, which provided that the works to be vested in the trustees of the said navigations respectively under that Act should be the works described in that behalf in the award of the said Commissioners of Public Works, and the works (connected with such navigations respectively), for the maintenance whereof as works of drainage, trustees were to be appointed under the Act of 1842 and the Acts amending the same, should be the works described in that behalf in the award of the said Commissioners.

Sections 4 and 5 contained the names of the first trustees of the Lower Bann and Upper Bann Navigations respectively; and the trustees for the time being of such respective navigations were constituted bodies corporate with perpetual succession and common seals.

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By section 15 such navigation trustees were empowered to levy rates or tolls in respect of the use of the navigation of which they were trustees, and also for wharfage or quayage at any pier, harbour, landing place, quay or wharf built, erected or made in connection therewith; and by section 24 it was provided that the income which the trustees should receive in respect of such tolls or rates should be applied in payment of salaries of officials and in payment of expenses of collection and of expenses attending or incident to the maintenance of the works of the navigation of which they were trustees, and all other expenses attending the conservancy of such navigation.

Section 25 made provision for the payment of all expenses of and incident to the maintenance and conservancy of said navigations (so far as they might not be defrayed out of said income) by contribution from the counties, baronies and townlands as should be provided by the award of the Commissioners of Public Works. By section 26 temporary powers were conferred for a period of two years upon the Treasury to make certain limited advances to the navigation trustees to be applied amongst other purposes "in the necessary maintenance and repair of such navigation." Finally, section 29 enacts that, if any such navigations or any of the works connected therewith is or are not kept and maintained in good and proper repair by the trustees thereof, it should be lawful for the Commissioners of the Treasury to make advances to the Commissioners of Public Works for the execution by them of necessary repairs.

The statutes to which I have referred appear to me clearly to establish that it was the intention of the Legislature that compensation should be awarded for injury or damage done in the execution of the authorised works, and that all works duly executed, whether for navigation or drainage purposes, should be duly and properly maintained and conserved by the trustees in whom such works are respectively vested.

Two awards of the Commissioners of Public Works, dated 18th February, 1859, and 4th April, 1859, referred to as the navigation and drainage awards respectively, were put in evidence. The first of these contains a recital that the works necessary for the improvement of the navigation in connection with drainage in the district

of Lough Neagh had been completed. It then sets out, in what is stated to be "our final award," of what the Lower Bann and Upper Bann Navigations respectively consist in the same manner as the same were described in the Act of 1856, and as identified in a signed and enrolled map; and "the works connected therewith" were stated to be the works appearing and set forth in the said map and in the Schedule marked B thereunto annexed. I pass over the portions of the award which refer to the total cost and expenses incurred in the making of the navigation and the proportions thereof to be charged in respect of the works and deemed a free grant respectively, with other provisions incident thereto. The award next provides that all expenses of and incident to the maintenance and conservancy of the Upper Bann Navigation and Lower Bann Navigation (so far as same might not be defrayed out of income) should be charged upon the lands and in the manner therein specified. Then follows a provision in almost identical terms with that which preceded, that the works executed in the said district connected with the said navigation, the maintenance whereof as works of navigation was to be vested in and undertaken by the trustees of the Lower and Upper Bann Navigations respectively, were those respectively mentioned in Schedule B. This schedule contains, as it were by way of heading, a description in similar terms of these works of navigation; and it is conceded that the schedule does not include any reference to Ballyronan Pier or its approach. That the works enumerated in the schedule are strictly navigation as distinguished from drainage works is best evidenced by the fact that, though the channel of the Blackwater River is so specified, it is expressly stated that this does not include "the embankments or sluices along said river which are to be maintained by the drainage trustees."

The second or drainage award, made some six weeks later, commences with a recital that the works necessary for the drainage and improvement of the lands within the district of Lough Neagh had been completed, and contains what is stated to be a final award as to the lands which had been so drained and improved. The award next refers to "the works which had been completed for the drainage and improvement of the lands

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within the said district (including those for navigation and works in connexion therewith)" as the works mentioned in Schedule B thereunto annexed; and further declares that of the aforesaid works the several works mentioned and referred to in Schedule B (a) thereunto annexed were the works for the maintenance whereof as works of drainage, trustees were to be appointed. Turning to Schedule B, we find that it is referred to in the heading as "giving a description of the several works executed in the said district." From their nature some of them were obviously made purely for drainage purposes, whilst it is equally clear that others were concerned with navigation. Included amongst the latter was the following work, which from its importance in the present case I set out verbatim:—

"The extension of Ballyronan Pier in Lough Neagh and dredging approach to it; as also the deepening of harbours at Langford, Kinnigo and Portadown; and the deepening of entrance of Maine River to compensate for lowering the water of Lough Neagh."

The terms of Schedule B (a) which, as above stated, contains a list of the works of drainage, may be passed over with the observation that, as one would expect, it contains no reference to the works at Ballyronan. If properly described as a work, it was obviously a work of navigation rather than of drainage. If it was a work of navigation, it was in my opinion the duty of the defendants under section 2 of the Act of 1856 to hold, maintain and preserve it.

On behalf of the defendants it is submitted that the work at Ballyronan is not a work of navigation at all, as it is not referred to in the navigation award of 18th February, 1859; and it is contended that it is only works which are specified in a navigation award that can be properly described as navigation works for whose maintenance the defendants, as trustees, are responsible under section 2. I am unable to accede to this argument, though I, of course, admit that it would have been clearer, as it would have been more regular, had this work at Ballyronan been set out specifically in the navigation award. Why it was omitted from that award we do not know, and can only speculate. It may be that it was a mere oversight; it may be that it was because the work

was not entirely completed at the date of the navigation award. For this latter theory some support is derived from portion of the annual report, dated 28th January, 1860, of Mr. Boylan, the engineer of the Commissioners of Public Works as to the work executed during the year 1859. He states, under the heading of "navigation," that the works executed for navigation consisted (*inter alia*) in removing some obstructions at the entrance to Ballyronan Harbour as well as the maintenance of the navigation works generally up to the 25th June, 1859, on which day they were given in charge to the navigation trustees, and had since been maintained by them, except the channel through Lough Beg, which was referred to as "not yet completed." These last words are of some importance, as they show that the statement in the recital to the award as to the completion of all navigation works prior to the making of the award on 18th February, 1859, must not be construed too literally, or as intending to convey more than that they had been substantially completed at that date. Such may well have been the case with Ballyronan, in reference to which we are also told in the same report of the Commissioners' engineer that during the month of July a spoon barge was employed deepening the entrance to the harbour where some deposits had accumulated. All this is in sharp contrast with the portion of the report which deals with drainage, regarding which it is stated that no work had been executed since 9th February, 1859.

But whatever be the reason for the omission of the work at Ballyronan from the navigation award, it seems to me that there are certain matters which are conclusive in the plaintiff's favour. The extension of a pier, and the dredging of the approach to it to compensate for lowering the water of the lough must assuredly be regarded as a work in any ordinary acceptation of the term, and it is equally clear that the object in view in such work was the improvement of navigation. In the absence, therefore, of any definition clause limiting its meaning, I have no hesitation in saying that this pier extension and dredging was a "navigation work." If so, it seems to me that such work vests, by the express terms of section 2 of the Act of 1856, in the navigation trustees, to be held, maintained and preserved by them. If it was in fact, as I clearly conceive it to have been, a navigation work, its

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omission from the navigation award is not fatal, for the award could not undo what the statute had already done; and in my opinion the only way to construe and reconcile the provisions of sections 2 (vesting) and 3 (award) is to hold that the object of the latter section was, by means of such award, to enable any doubt to be removed as to whether a particular work was a navigation work or a drainage work. Thus, let us suppose a lock or a weir (either of which is a "work") had been omitted by oversight from the award, could it be seriously argued that it was not vested in the navigation trustees by virtue of the provisions of section 2? If it is clear, as I conceive it to be, that this work at Ballyronan was a navigation work, the vesting operates under the section just as effectually as if it were specifically mentioned therein; for the vesting is expressly stated in that section to be effected "by virtue of this Act," though the date upon which it actually takes place is the date of the award "in relation thereto," i.e., the date of the award in reference to the particular navigation of which it is a work.

But even if I were wrong in the view which I have expressed above, and if express inclusion in terms in an award be essential to vesting, I should not hesitate on the facts of this case to hold in plaintiff's favour on the following grounds. In the first place, the works of navigation are identified in the award of 18th February not merely by Schedule B, from which it is omitted, but also by their "appearing" and being "set forth" in the enrolled map or plan referred to in the award. In this map or plan new work at Ballyronan is clearly indicated. Taken by itself I admit that this would not suffice; for a complete and unambiguous description in a document will prevail over a map attached thereto, which may be regarded simply as *falsa demonstratio*. *Dublin & Kingstown Rly. Co.* v. *Bradford* (1). But in the present case we have something more. We have the award of 4th April, 1859, which, though headed "drainage and water power," contains, as I have already pointed out, in separate schedules lists of—

(a) "Works for the drainage and improvement of the lands (including those for navigation and works in connexion therewith)" and

(b) "Works of drainage."

(1) 7 I.C.L.R. 57

The former list includes this Ballyronan work; and it is to be remembered that both awards were made by the same two Commissioners of Public Works in Ireland. To me it seems evident that the Commissioners were by this means amplifying or completing the previous award. This is particularly apparent from the language adopted, which, with ample justification from the Acts of Parliament, treats the expression "works for the drainage and improvement of lands" as generic, and as including "works for navigation and works in connexion therewith."

There is one further circumstance which appears to me to be a matter of supreme importance, namely, the construction placed on the Acts and awards by both parties for upwards of fifty years, during which time it is admitted that all necessary dredging or other maintenance work at Ballyronan was executed by the defendants. It was not until a new engineer came into their employment in or about the year 1911 that they first questioned their legal responsibility for this maintenance work. Was all the work done up till that date purely voluntary? On the argument of Mr. Murphy, who repudiated the suggestion of vesting, it must have been virtually a trespass. The maxim *optima legum interpres consuetudo* is at least as old as the time of Lord Coke; it is the law to-day. Though usage cannot affect the construction of a statute of which the meaning is clear, a construction long acquiesced in will, in case of ambiguity, not be departed from, even, it is said, though it appears to be incorrect. For the modern recognition of this principle, *Cox* v. *Leigh* (1), and many other cases might be cited.

Finally, it appears to me that a construction which imposes a continuing liability of maintenance on the defendants is a reasonable construction; for I am unable to appreciate the submission that a permanent injury to or interference with navigation can be adequately compensated for by the execution of certain limited works to be maintained by and at the expense of the persons who have suffered the loss. Compensation, if adequate,

(1) L.R. 9, Q.B 333

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should place an injured person in as good a position as before the injury was inflicted. This is not accomplished by the execution of works involving obligations of maintenance, unless responsibility for such maintenance is also imposed. The Commissioners of Public Works effected the necessary dredging before handing over the navigation works to the defendants. It was the latter's duty so to maintain and preserve them.

In my opinion the judgment and order of Brown, J., must be set aside, and the plaintiff is entitled to the declaration which he seeks. As he does not now press for a mandatory injunction, there will be no order as to same. In the absence of agreement there must be an inquiry as to damages, and the plaintiff must have his costs of action, including the costs of this motion.

BEST, L.J.: In this action plaintiff claims a declaration that the defendants are bound to keep and maintain the water passage and entrance to Ballyronan harbour and pier in a navigable condition, proper and effective to admit lighters carrying from 70 to 80 tons burthen and of at least six feet draught to load and unload at the said pier and to come and go from alongside the said pier at all times. Plaintiff also claims a mandatory injunction and an injury as to damages.

The plaintiff is or was a trader carrying on business at Ballyronan in the county of Londonderry. It is alleged that in the year 1788 the predecessor in title of plaintiff erected a pier and quay extending into the waters of Lough Neagh, and that same have since that date been continuously used by plaintiff or his predecessors in title for the purpose of loading and unloading lighters carrying goods and merchandise, and by other persons, principally fishermen.

The Commissioners of Public Works in Ireland were empowered by certain Acts of Parliament passed in 1842 and continued down to 1857 to promote the drainage of lands and the improvement of navigation and water power in connection with such drainage. It is unnecessary for me to summarize the provisions of these statutes, as I have had an opportunity of considering carefully the terms of the judgment just delivered, and it accurately sets out the substance and effect of the sections of the various Acts

so far as same are relevant to the question for decision in this case.

Pursuant to the provisions of the Acts referred to, the Commissioners of Public Works made two awards, one dated 18th February, 1859, and the other dated 4th April, 1859, and these two awards are in evidence.

The first award, which is headed "Navigation undertaken in connexion with drainage," recites inter alia that the works necessary for the improvement of navigation in connection with drainage in the district of Lough Neagh have been completed, and the Commissioners then make what they describe as "our final award." It declares that the navigation which has been so made and improved consists of two divisions, viz., the Lower Bann and Upper Bann Navigations, which are accurately defined, and these divisions correspond with the description of same in the Act of 1856 (19 & 20 Vict., c. 62) ,and they are more particularly shown and described in a signed and enrolled map, and the works connected therewith are the works appearing and set forth in the said map and in the Schedule marked B to the said award annexed.

The award then makes provisions as to the costs and expenses of the said navigation, and how these are to be defrayed, and directs that all expenses of and incident to the maintenance and conservancy of the Upper Bann Navigation and of the Lower Bann Navigation (so far as the same may not be defrayed out of income) should be charged upon the lands and in the manner in said award specified, and it is further specified and awarded that the works executed in the said district connected with the said navigation, the maintenance whereof as works of navigation is to vested in and undertaken by the trustees of the Lower and Upper Bann Navigations respectively, are those respectively mentioned in Schedule B.

This Schedule contains by way of heading a description of the works of navigation similar to that contained in the body of the award, and admittedly there is no reference in the Schedule to the pier at Ballyronan or the approach thereto.

Defendants contend that the omission of any reference to Ballyronan is fatal to plaintiff's claim, but Mr. M'Gonigal's answer is that dredging the entrance to the harbour is not a "work," or if it be a "work," it is

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not such a "work" as the Commissioners should set out in their award to comply with the provisions of section 3 of the Act of 1856.

The second award made on the 4th of April, 1859, begins by reciting that the works necessary for the drainage and improvement of the lands within the district of Lough Neagh have been completed, and proceeds to make a final award as to the lands so drained and improved within the said district, and it further states that the works which have been completed for the drainage and improvement of the said lands within the said district (including those for navigation and works in connection therewith) are the several works mentioned in the Schedule B thereunto annexed, and it further states that of the aforesaid works, the several works mentioned and referred to in Schedule B (a) thereunto annexed are the works for the maintenance whereof as works of drainage trustees are to be appointed under the Act of 5 & 6 Vict., c. 89, and the Acts amending the same. The works referred to in Schedule B, though concerned with drainage, are specifically stated to include "those for navigation and works in connexion therewith," but apart from this declaration it will appear from an examination of Schedule B that many of the works mentioned therein are works for navigation and not for drainage. I think that Mr. M'Gonigal's argument is correct, viz., that the Commissioners of Public Works set out in Schedule B of the second award all works done by them in connection with both navigation and drainage, and in Schedule B (a) to the same award they set out the works for which the drainage trustees are to be liable, leaving what remains in Schedule B of works to be maintained and preserved as necessary for navigation to be carried out by the navigation trustees under section 2 of the Act of 1856.

The purpose for which the Act of 1856 was passed was the improvement of navigation and the maintenance and preservation of such navigation, and in my opinion it is incumbent on the Lower Bann Navigation trustees and their clear duty under that Act to maintain and preserve the navigation to Ballyronan pier and harbour in the same condition as that in which it was when the maintenance of the navigation works was vested in and undertaken by them.

It was pointed out in the argument for plaintiff that this entails no real hardship on the trustees, as they can collect tolls to defray the expenses of dredging and, in case of a deficiency, can look to certain townlands and baronies in the counties of Antrim and Londonderry to bear and pay such deficiency in the same proportions as these townlands, baronies and counties are chargeable with the payment under the first award of the principal sum thereby charged.

The submission of the defendants is that the work at Ballyronan is not a navigation work and, as already stated, they argue that the omission of any reference to Ballyronan in the award of 18th February, 1859, is fatal to plaintiff's claim in this action. I do not know why there is no such reference in this award. It may be that the work was not completed at the date of the making of this award or that the matter was overlooked, but the second award cures the omission, and I have no hesitation in holding that the work at Ballyronan is a work of navigation, and as such is bound to be held, maintained and preserved by the trustees under section 2 of the Act of 1856.

There is just one other matter to which I wish to refer. The view was adopted by the trustees and acted on by them for upwards of fifty years that they were under the obligation of doing all dredging or other necessary work for the maintenance of the navigation at Ballyronan pier and harbour, and although such continued action on the part of the trustees could not affect the construction of a statute or awards made thereunder whose meaning is clear, yet, in case of ambiguity, a construction long acquiesced in where the statute is ambiguous will not lightly be departed from. However, for the reasons already stated, there is, in my opinion, no ambiguity in this case, and I hold that the trustees are liable to maintain and preserve the pier and harbour as fit for navigation as when same were vested in them by the Commissioners of Public Works.

I agree that an order should be made in the terms stated by my colleague.

Solicitors for the plaintiff: *French & French.*

Solicitors for the defendants: *Crookshank, Leech, & Davies.*

J. McC.

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[IN THE COURT OF APPEAL.]

Oct. 29, 31. Nov. 26.

DEVINE v. CARSON & CO. (BELFAST), LTD. (1).

(1927. No. 2416.)

Practice—New trial—Verdict against evidence—Questions for the jury—Requisitions—Omission to apply for direction—Discretion of court—Married woman trader—Execution against husband—Report of judge—Special bailiffs—Residence within county—27 & 28 *Vict.*, *c.* 99, *s.* 5—34 & 35 *Vict.*, *c.* 99, *ss.* 5, 6, 7.

The plaintiff E.D. brought an action for trespass and for illegal seizure of her stock and furniture. The defendants contended that the goods and chattels seized were the property not of the plaintiff but of her husband, against whom a civil bill decree had been made. The plaintiff pleaded, inter alia, that the sheriff's warrant was invalid as special bailiffs could not execute a decree outside the county in which they resided.

Evidence was given at the trial that from the year 1917 the plaintiff's husband carried on a drapery business, that he failed and was evicted, and that his business was sold in 1926. Subsequently in the same year the plaintiff took a letting of the premises upon and in which the alleged trespass and illegal seizure took place. The plaintiff declared that the furniture seized was purchased by her after her marriage with money she got from her mother. One of the special bailiffs called for the defence stated that the plaintiff said at the time of a seizure at her husband's premises in 1926 that the furniture belonged to her brother-in-law. The plaintiff said that money to start her business was given to her by her brother and sisters. She took out a licence for the sale of tobacco in her own name, and sold sweets, tobacco and groceries in a small way. She ordered the goods herself, and her name was over the door of the premises. Invoices for cigarettes to Messrs. D. & Co. were put in evidence and a bill-head of D. & Co. As to these documents, the plaintiff said that her sister was in partnership with her. The only issue submitted to the jury, apart from the question as to damages, was, "Was the furniture seized the property of the plaintiff." To this question the jury answered "No." It was contended on behalf of the plaintiff in the Court of Appeal that the term "furniture" was intended to include stock-in-trade. The trial judge in his report stated that he was disappointed in the verdict.

On motion for a new trial:

Held, by the Court of Appeal (Andrews and Best, L.JJ.), (a) that the verdict of the jury, that the furniture seized was not the property of the plaintiff, must be set aside as being against the evidence.

Held further (b) that the omission of the plaintiff to ask the judge at the trial to direct a verdict for the plaintiff, on the ground that the

(1) In the Court of Appeal before Andrews and Best, L.J.J.

sheriff's warrant under which the entry was made and the seizure effected was invalid, as the special bailiffs appointed were not competent to act as such bailiffs and could not execute a decree outside the county in which they resided, did not preclude the Court of Appeal from entertaining that question, and that in the circumstances the Court of Appeal, under Order xxxix, r. 7, might order judgment to be entered for the plaintiff on that ground notwithstanding such omission, *Banbury* v. *Bank of Montreal* [1918] A.C. 626 followed.

Held, also (c) that the questions submitted to the jury did not try all the issues.

Held, also (d), that the plaintiff was entitled to judgment on the issue of trespass.

The judgment entered for the defendants was set aside, and a new trial was directed in respect of the illegal seizure. Judgment was entered for the plaintiff on the issue of trespass.

MOTION on behalf of the plaintiff, Eva Devine, for an order that the verdict and judgment entered for the defendants, J. M. Carson & Co. (Belfast), Ltd., be set aside, and that judgment be entered for the plaintiff with costs, or in the alternative that a new trial be directed on the grounds (inter alia):—

(a) that the finding of the jury was against the evidence;

(b) that damages should have been assessed by the jury upon the uncontradicted evidence before them in respect of the wrongful entry into the plaintiff's house, and the wrongful seizure of the personal belongings, articles of clothing and watches of the plaintiff;

(c) that the special warrant under which the seizure purported to be made was irregular and the seizure unlawful.

The plaintiff alleged by her statement of claim that the defendants by their servants or agents wrongfully entered the plaintiff's premises, and wrongfully seized and converted to the use of the defendants, the plaintiff's stock, furniture, and effects and refused to give them up on demand and detained them until the plaintiff paid the sum of £7 10s 0d under protest.

The defendants pleaded that the goods and chattels seized were the property, not of the plaintiff, but of Patrick Devine, her husband, against whom a civil bill decree was lawfully and properly executed. The plaintiff in her reply pleaded that the special bailiffs, both of whom resided in Belfast, were not lawfully authorised to execute a civil bill decree of the County Court Judge of Tyrone.

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The action was tried before Brown J. and a common jury of the city of Belfast on 27th June, 1928.

The facts and evidence so far as material were as follows:—

The plaintiff married her husband, Patrick Devine, in 1917. He carried on business as a draper in Aughnacloy, in the county of Tyrone, but in 1926 he became a bankrupt, was evicted from his shop and premises, and his property was sold in the bankruptcy proceedings. Later in the same year the plaintiff took a lease of the premises upon and in which the alleged trespass and illegal seizure took place. She bought the furniture in Belfast, after her marriage, with money she got from her mother. In 1926 other members of her family provided her with money to start her in business. She got a licence for the sale of tobacco in her own name, and sold sweets, tobacco and groceries. In May, 1927, two men, Williamson and Fisher, special bailiffs from Belfast, came to the plaintiff's shop and seized all her stock and furniture in execution of a civil bill decree made by the County Court Judge of the County of Tyrone in a civil bill brought by the defendants against Patrick Devine, her husband. The plaintiff borrowed a sum of money which she paid to these men and got a receipt therefor, and the stock and furniture were thereupon released. She gave evidence that she bought the stock herself, though sometimes it was sent addressed to Patrick Devine and sometimes to Devine & Co. Her name was over the door.

Williamson stated that the plaintiff had said at the time of an earlier seizure at her husband's premises that the furniture belonged to her brother-in-law.

The learned judge left to the jury the following questions, to which their answers are here given:—

(a) "Was the furniture seized the property of the plaintiff?" [Answer, "No."]

(b) "If so; damages?" [Not answered.]

On this finding of the jury the judge gave judgment for the defendants.

The plaintiff applied to the Court of Appeal (1) for an order that the verdict and judgment entered for the defendants be set aside, and that judgment be entered for the plaintiff, or in the alternative that a new trial be directed.

(1) In the Court of Appeal before Andrews and Best, L.J.J.

Davison K.C. and *M'Coy* for the plaintiff:—

On the facts, no jury could reasonably find that the goods were the husband's property and their finding should be set aside. *Solomon* v. *Bitton* (1), *Metropolitan Railway Co.* v. *Wright* (2), *Jones v. Spencer* (3).

In *Webster* v. *Friedeberg* (4) Lord Esher M.R. said, at p. 737: "It is idle to say that, in determining whether a verdict was against the weight of evidence, you must not take into serious consideration the opinion of the judge who tried the case. No one has ever said that his opinion is conclusive, but it is a matter to be taken into serious consideration." In the present case the facts are all one way.

The warrant was invalid as the defendants elected in the first place to have the execution carried out by means of the sheriff and his own officers, and they could not subsequently, on a return of nulla bona, proceed to levy by special bailiffs. The sheriff's warrant was also invalid on another ground, the special bailiffs appointed were not competent to act, as special bailiffs could not execute outside the county in which they resided. *Rex* v. *Forseythe* (5). Section 5 of 27 & 28 Vict., c. 99, provides "that the sheriff shall from time to time thereafter, as the occasion shall require, appoint by writing under his hand a sufficient number of persons resident within the county, and one at least of whom shall be resident within each quarter sessions district thereof, to be bailiffs." Section 4 of 34 and 35 Vict., c. 99, provides that this Act and 27 & 28 Vict., c. 99, are to be read together as if they were one Act. The word "bailiff" as applied to a special bailiff must bear the same meaning as "bailiff" in section 3 of 27 & 28 Vict., c. 99.

A married woman who has bought a business out of her separate estate, and is carrying it on as her own, is not the less carrying on a trade separately from her husband, because the business happens to be carried on in the house in which she and her husband are living and

(1) 8 Q.B.D. 176
(2) 11 A.C. 152
(3) 77 L.T. 536
(4) 17 Q.B.D. 736
(5) 36 I.L.T.R. 100

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the husband may be taking some part in the management of it. *In re Worsley* (1) and *In re Simon* (2).

Williamson K.C. and *Reid* for the defendants :—

This is a small action, and the courts hesitate to give a new trial to trivial actions, *Joyce* v. *The Metropolitan Board of Works* (3). All the reported cases show that a verdict that an honest jury could have found will not be set aside. In *Hampson* v. *Guy* (4) it was held that where a new trial is sought to be obtained on the ground that the verdict in the court below was against the weight of evidence, in a case where there was some evidence to support the verdict, it is not enough that the jury who tried the case, or the judges of the Court of Appeal, might have come to a different conclusion; but there must be such a preponderance of evidence against the verdict as to make it unreasonable that the jury, when properly directed by the judge, should return the verdict they did. Attention must be paid to the course of the trial. The business of the courts could not be carried on unless the course of the trial bound the parties.

The question of the residence of the special bailiffs does not arise.

[*Jones* v. *Spencer* (5) and *Australian Newspaper Company* v. *Bennett* (6) were also cited.]

Davison K.C. (in reply) :—

The test is whether having regard to all the circumstances of the case the verdict of the jury is a reasonable one.

Cur. adv. vult.

Nov. 26.

ANDREWS, L.J. : This is a motion by the plaintiff that the verdict and judgment in the defendants' favour in this action, dated 27th June, 1928, be set aside, and that judgment be entered for the plaintiff with costs, or, alternatively, for a new trial. The action, which was tried

(1) [1901] 1 Q.B. 309
(2) [1906] 1 K.B. 201
(3) 44 L.T. 811
(4) 64 L.T. 778
(5) 77 L.T. 536
(6) [1894] A.C. 284

before Brown J. and a common jury of the city of Belfast, was brought to recover damages for illegal seizure and trespass on 24th May, 1927, when, as alleged, the defendants, under colour of a civil bill decree, made on 7th June, 1926, by the County Court Judge of Tyrone against one Patrick Devine, the husband of the plaintiff, by their agents and bailiffs, Edward Williamson and Wm. Jos. Fisher, wrongfully entered the plaintiff's house and premises in Aughnacloy, and wrongfully seized and converted to their own use the plaintiff's stock, furniture, and effects, and refused to give them up until the plaintiff paid the sum of £7 10s 0d under protest. Whilst all material averments in the statement of claim were traversed in the defence, the principal issue raised by it was the ownership of the goods and chattels seized, which, it was contended, were the property not of the plaintiff but of the said Patrick Devine, against whom the said civil bill decree was lawfully and properly executed. The reply raised the further issue that Williamson and Fisher, both of whom it was alleged resided in Belfast, were not lawfully entitled or authorised to execute a civil bill decree of the County Court Judge of Tyrone.

Evidence was given at the trial that the plaintiff was married to Patrick Devine, a draper in Aughnacloy, in 1917. He failed, was evicted, and his business sold out in 1926. Subsequently in the same year the present plaintiff, by an agreement of 4th December, 1926, took a monthly letting of the house and premises in Aughnacloy upon and in which the alleged trespass and illegal seizure took place. Further evidence was given by the plaintiff with apparently considerable detail in reference to her alleged ownership of the furniture seized, which she declared was for the most part purchased in Belfast after her marriage with money she got from her mother. In cross-examination it was suggested to the plaintiff that her husband had included the furniture as part of his assets in the bankruptcy. The plaintiff denied all knowledge of this, and no attempt was made to give any further evidence in regard to it. Further, Edward Williamson, the special bailiff, called for the defence, stated that the plaintiff said at the time of the seizure at her husband's premises in

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September, 1926, that the furniture belonged to her brother-in-law. Although this must be admitted to be some evidence, I can attach but little importance to it, for the alleged statement was never put to the plaintiff in cross-examination, as it undoubtedly should have been if reliance were to be placed upon it. This is the entire evidence adduced on either side as to the ownership of the furniture; and, although it must be admitted that there was some evidence to go to the jury, their verdict that the furniture seized was not the property of the plaintiff was, in my opinion, entirely against the evidence and the weight of evidence. It was a verdict which was, in my judgment, unsatisfactory, unreasonable and unjust—one which twelve reasonable men who had followed the evidence and understood the case could not honestly or properly find, and it therefore cannot be upheld. *Metropolitan Ry. Co.* v. *Wright* (1). In the view I have taken of the evidence, I am confirmed by the opinion of the learned judge, who reports to us that he was disappointed in the verdict. Though this expression of opinion could not be allowed to weigh against the verdict of a jury if supported by proper evidence, *Solomon* v. *Bitton* (2), it is in my opinion not only legitimate for, but obligatory upon, us seriously to consider it, *Webster* v. *Friedeberg* (3), and it is further our duty on the facts of the present case to give effect to it, more especially as it entirely coincides with our own view.

In my judgment so far I have treated the question submitted to the jury as applying only to what is expressly mentioned in it, namely, "furniture." It is asserted by the plaintiff's counsel that the term "furniture" was intended to include "stock-in-trade"; and, though this is not admitted by the defendants' counsel, it is probably the true view, as the learned judge says in his report that the net issue in the case was whether the "stock and furniture" were genuinely owned by the plaintiff. Can we be satisfied, however, that the jury so understood it? Though counsel do not appear to have objected to its form, it was

(1) 11 A.C. 152 (2) 8 Q.B.D. 176
(3) 17 Q.B.D. 736

admittedly an ambiguous and, therefore, unfortunate way in which to put the question, especially as entirely different evidence was given by the plaintiff in regard to the manner in which she acquired the stock from that in which she acquired the furniture. Money to start her business was, she said, given to her by her brother and four sisters. She took out a licence for the sale of tobacco in her own name, and sold sweets, tobacco and groceries in a small way. She ordered the goods herself and her name was over the door of the premises. As against the view, however, that she owned the business, invoices for cigarettes from Messrs. M'Mullan & Co. to "Messrs. Devine & Co." were put in evidence, and also a bill-head of "Devine & Co." described as "grocers, confectioners and tobacconists." When confronted with these documents the plaintiff said that her sister was in partnership with her, but she did not say to which of her sisters she referred. There was also the evidence of Williamson, the bailiff, that when he went to the premises in May, 1927, the husband Pat was behind the counter giving orders to a traveller. Such evidence is far from conclusive; yet I am of opinion that it was evidence which the jury were or would have been entitled to take into consideration on the issue as to whether the stock-in-trade was the property of the plaintiff. Accordingly, if I were satisfied that the jury intended their answer as to "furniture" to include stock-in-trade, and that this was really present to their minds, I might have some difficulty in saying that as regards the stock in trade there was no evidence or insufficient evidence to support it; but, as already indicated, I am not so satisfied.

In the next place, it is necessary to consider the uncontradicted testimony of the plaintiff as to the seizure of her linen, her clothes, and her watches. Were they also intended to be included in the term "furniture?" If they were, the verdict cannot possibly be supported in regard to them. If they were not so included, we are without either a direction of the learned judge or a finding of the jury in regard to them. Yet it is apparent from the evidence given at the trial that the plaintiff never intended to abandon this part of her case; and in the notice of motion to this court she sets out the omission to assess

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damages in respect of these articles as a separate and distinct ground of appeal.

A further point was raised in the pleadings and argued before us that the sheriff's warrant under which the entry was made and the seizure effected was invalid on the ground that the special bailiffs appointed were not competent to act, as special bailiffs were, it was submitted, in the same position as sheriff's bailiffs and could not execute outside the county in which they resided, namely, in the present case, the city of Belfast. Another point, though not specifically raised in the pleadings or at the trial, was made to the effect that the warrant was invalid as the defendants elected in the first place to have the execution carried out by means of the sheriff and his own officers, and that they could not subsequently, on a return of nulla bona proceed to levy by special bailiffs. As at present advised, I am not prepared to accept this latter contention; but I refrain from expressing any concluded opinion upon it, as the point was not raised in the pleadings or at the trial and no application has been made to us to amend. At the same time I must strongly condemn the manner in which the second warrant was issued by pasting it over the previous warrant to the sheriff's own bailiffs, thus obliterating all evidence of that warrant and all record of actual or attempted execution thereunder.

As regards the first contention it is unfortunate that, although evidence was directed to it, no requisition was made to the learned judge in regard to it. I may say, however, that it seems to me to be quite irrelevant on the question of illegal seizure at the suit of the present plaintiff; as, if the furniture and other goods seized were the property of the plaintiff, she is entitled to succeed whether the warrant against her husband was valid or not; whilst, if such furniture and goods were not her property, a defective warrant cannot give her a cause of action in respect of their seizure.

The materiality of the question, however, arises, in my opinion, on the issue of trespass to plaintiff's premises raised in the pleadings, but upon which again the judge was not asked to direct or to submit any question to the jury. On the uncontradicted evidence given at the trial

the plaintiff must be taken to have been the tenant of these premises. Assuming this to be so, the law is, I think, clear that as Patrick Devine was living with his wife, the plaintiff, in these premises, the entry thereon to seize the husband's goods was lawful provided the warrant under which it was effected was valid; for, as is stated by the learned Editors of Smith's Leading Cases in the Notes to *Semayne's Case* (1 Vol. 12th Edit. p. 115), "a house in which the defendant habitually resides is on the same footing with respect to executions as his own house." On the other hand, if the warrant was invalid and a mere nullity, the entry on the plaintiff's premises by the special bailiffs was unlawful, and the defendants, as their principals, are liable to the plaintiff in damages for the trespass. In my opinion, the learned judge should in the first place have been asked by proper requisition to give his ruling on the purely legal issue as to the validity of the warrant. If such ruling was in plaintiff's favour, the judge should next have been asked to rule that, on the uncontradicted evidence of ownership of the premises, plaintiff was entitled to damages for trespass, and on such ruling being given he should have been asked to put a question to the jury as to the amount of same. None of these things, however, was the learned judge requested to do; and it is probable that the explanation given to us for all the omissions at this unfortunate trial is correct, namely, that counsel and judge alike were of opinion that the jury would find the simple questions submitted to them in plaintiff's favour, and, accordingly, that further elaboration of questions and rulings upon somewhat novel legal issues were alike unnecessary.

I have very carefully considered the course which this court should take under the circumstances which I have detailed above as regards both causes of action for illegal seizure and trespass. Some years ago the paramount consideration in such cases was that the parties must be held absolutely bound by the course of the trial. *M'Dougall* v. *Knight* (1) and *Nevill* v. *Fine Art and General Insurance Co.* (2) afford good illustrations of how the House of Lords and, in particular, Lord Halsbury, C., emphasised the

(1) 14 A.C. 194 (2) [1897] A.C. 86

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necessity for litigants to have all proper questions submitted to the jury, as nothing could be more mischievous when parties had taken their chance of what a jury would do than to allow them to raise new questions after the jury had decided against them. No court, he said, would ever have granted a new trial where you are complaining of non-direction of the judge, or that he did not leave a question to the jury, if you had an opportunity of asking him to do so and you abstained from asking for it. The principle underlying these cases was applied by the Irish courts in many cases, of which *Colville* v. *Bowman* (1) may be cited as an illustration. In that case Madden J. is reported to have said that "even if it had been a case in which there might have been a miscarriage of justice, the courts have held that the business of the courts could not be carried on unless the course of the trial bound the parties."

None of these cases, as far as I am aware, has ever been expressly overruled or dissented from; on the contrary, the necessity for having regard to the course of the trial has been fully recognised by the House of Lords in the recent case of *Wilson* v. *United Counties Bank Ltd.* (2), but the trend of modern authority, under the influence of new rules of court, is undoubtedly in favour of a relaxation of the rigour of the rule where its insistence would result in a substantial wrong or miscarriage of justice. It seems to me that it is only in this way that effect can be given to Or. 39, r. 7, which provides that "a new trial shall not be granted on the ground of misdirection . . . or because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to them, unless in the opinion of the court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial." This rule is, in my opinion, a clear recognition of the new spirit that the laudable desire for finality in litigation, which lies at the root of the old principle of adherence to the course of the trial, must yield place to the still more praiseworthy determination of our courts to remove where possible a substantial wrong or mis-

(1) 38 I.L.T.R. 75 (2) [1920] A.C 102

carriage of justice. Thus in *Banbury* v. *Bank of Montreal* (1) a majority of the House of Lords, consisting of Lords Atkinson, Parker and Wrenbury, held that the omission of the defendant to ask the judge at the trial to nonsuit the plaintiff or to direct a verdict for the defendant on the ground that there was no evidence upon which the jury could reasonably find for the plaintiff does not preclude the Court of Appeal from entertaining the question of no evidence, and in a proper case from ordering judgment to be entered for the defendant on that ground, notwithstanding such omission. The court further held that the question whether the Court of Appeal should allow a point of law not raised in the court of first instance to be raised on appeal goes not to jurisdiction but to discretion. In the exercise of such discretion the court must be careful that, in its anxiety to remove one grievance, it does not possibly inflict another and perhaps a greater wrong. Thus, before entering judgment in a case in which neither non-suit nor direction was asked for, the Court of Appeal should be satisfied that they have all the facts before them, and that no further evidence of importance could have been produced at the trial, or might be produced at another trial, which would affect the result. If not so satisfied, the Court of Appeal should refuse to enter judgment.

Applying the principle of these authorities to the present case, I feel it our duty in the exercise of our judicial discretion to consider and rule upon the submission made to us as to the invalidity of the warrant. Could the special bailiffs be authorised to execute a decree by the sheriff of a county in which they did not reside? By the express terms of 27 and 28 Vict., c. 99, s. 5, a sheriff can only appoint residents in his own county as bailiffs to assist him in the execution of the duties imposed on him by that Act. Special bailiffs, such as Williamson and Fisher, are not, however, appointed under that Act but are nominated by the sheriff under 34 and 35 Vict., c. 99, s. 5, on the demand and at the peril of the party seeking to execute. That section does not contain the same express provision as regards residence; but, in my

(1) [1918] A.C. 626

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opinion, the intention of the legislature regarding the necessity for residential qualification is made abundantly clear by other provisions of the Act. Thus, as I pointed out during the argument, both types of bailiff are dealt with in a precisely similar manner under section 6—the misconduct section—which empowers the chairman of quarter sessions to order that the sheriff of the county or city in which such bailiff resides should not thereafter appoint him as bailiff. This salutary provision would be of little avail if persons so banned could be still nominated as special bailiffs by the sheriffs of all the other counties in which such persons did not reside. Section 7 also strongly supports the same view. The point arose for decision before the late Judge Overend, Recorder of Derry, in *Rex* v. *Forseythe* (1), who ruled that special bailiffs must reside within the county over which the sheriff who appoints them has jurisdiction. In my opinion that ruling was correct, and I believe it has since been universally recognised and acted upon by sheriffs. Even in the present case it was apparently recognised as good law; for, to overcome the residential disqualification, false addresses in the County of Tyrone were furnished to the sheriff and inserted in the warrant, which, in my opinion, is accordingly absolutely void. The defendants have, therefore, in my opinion, no answer whatever to the cause of action for trespass in the plaintiff's house and premises.

The conclusions at which I have arrived on the whole case may be briefly summarised as follows. The verdict of the jury cannot stand and must be set aside as being against evidence and the weight of evidence. Further, the question submitted to the jury did not try all the issues raised in the pleadings, and to which evidence was directed at the trial. We, accordingly, set aside the judgment entered for the defendants and direct a new trial of the action in respect of the alleged illegal seizure. The plaintiff is entitled to judgment on the issue of trespass, the amount of damages, in default of agreement, to be found by the jury.

As regards costs, we are of opinion that the plaintiff must be held in a large measure responsible for the

(1) 36 I.L.T.R. 100

fatalities of the first trial which have necessitated the motion to this court. It would, accordingly, be unreasonable that the usual order should be made for payment of costs by the defendants as the unsuccessful parties before us. On the other hand, these defendants are not entitled to the costs of vainly endeavouring to uphold a verdict which they should never have got. Whilst, therefore, directing that the costs of both parties of the first trial should be costs in the action and abide the ultimate result, we direct that each party should bear his or their own costs of the motion and hearing in this court.

BEST, L.J.: This is a motion by the plaintiff for judgment or for a new trial of the action, which was brought to recover damages for wrongful seizure and for trespass.

Plaintiff is a married woman living with her husband, Patrick Devine, at Aughnacloy, in the County of Tyrone. Patrick Devine carried on the business of draper, and in June, 1926, defendants obtained a decree against him for the sum of £8 4s 4d and £1 8s 4d costs. It is stated that a warrant in the ordinary form authorizing the sheriff's bailiff to execute this decree was appended at the foot thereof, and it is further stated that the bailiff, having attempted to levy execution thereunder, made a return of "No Goods."

From an examination of the decree as produced at the hearing of the action, it would appear that the above warrant, if it existed, had been cut off and in lieu thereof there had been pasted at the foot of the decree a form of warrant signed by the sheriff authorizing and empowering Edward Williamson and William John Fisher, whose addresses were given as being in County Tyrone, as special bailiffs to execute the said decree.

It appears from the evidence given at the hearing of the action, and it is not disputed, that in fact neither Williamson nor Fisher has any residence in the County of Tyrone, and that both reside in the city of Belfast.

About September, 1926, an auction was held of the goods of Patrick Devine, and he was ejected from his dwelling-house and shop.

By an agreement in writing dated the 4th day of December, 1926, Thomas M'Dowell let to the plaintiff a

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house, shop and offices in Main Street, Aughnacloy, on a monthly tenancy at the rent of £1 per month.

The seizure complained of in this action took place on the 24th day of May, 1927, and was carried out by Williamson and Fisher. After the seizure had been effected, the sum of £7 10s 0d was paid to Williamson and Fisher, who thereupon released the goods and furniture seized. These had been claimed by plaintiff as her own property, and the receipt given by Williamson and Fisher for the sum so paid is of importance as showing that in their view there were no goods of Patrick Devine in plaintiff's house.

That receipt is in the form following:—

Carson & Sons, Ltd.—Plaintiffs.
Belfast,
24th May, 1927.

Received from Patrick Devine, the sum of Seven pounds ten shillings and no pence, being part of defendant's costs. No goods in house.
£7 10s 0d. ED. WILLIAMSON.

ED. WILLIAMSON.

The action was tried by Mr. Justice Brown and a common jury of the city of Belfast and resulted in a verdict for the defendants.

The questions put to the jury and their answers are as follows:—

1st. "Was the furniture seized the property of the plaintiff?" Answer, "No."

2nd. "If so, damages?" Not answered.

The learned judge reports that the net issue in the case was whether the *stock* and furniture were genuinely owned by Mrs. Devine or was it merely a juggle between husband and wife; that he was disappointed in the verdict, and that he believed the wife, but evidently the jury did not.

Plaintiff asks that the verdict found and the judgment entered for the defendants be set aside, and that judgment be entered for her, or in the alternative that a new trial of the action be had.

Mr. Davison, K.C., for the plaintiff, attacked the verdict on the grounds that there was no evidence to support the jury's finding, that such finding was against the evidence and the weight of evidence, and as regards trespass that the seizure was wholly irregular because Williamson and Fisher were not and in law could not be special bailiffs to execute a decree in County Tyrone by reason of their residing in the city of Belfast and not in said county, and that, even if the regularity of their appointment as special bailiffs had not been affected by their non-residence in County Tyrone, yet they had no right to enter plaintiff's house to seize her husband's goods.

It is necessary to refer very shortly to the evidence given on the hearing of the action.

The plaintiff stated that she was tenant of the house in which the stock and furniture seized were found, that she was the person licensed to sell tobacco, that the furniture and stock were hers, she mentioned the sources from which the money to purchase them came, and she denied that her husband had any right to take part in the management of the business or was the owner of any of the contents of the house. Giving an account of the seizure complained of she said that Williamson and Fisher pulled all her linen out of the drawers and all her clothes, put these articles into a chest of drawers and placed it on the lorry, and that they seized two watches belonging to her. On cross-examination by Mr. Williamson, K.C., she admitted that her husband was a bankrupt, but did not know that her husband included the furniture as part of his assets in the bankruptcy, and to explain why the billheads of her business were in the form "Devine & Co." she said her sister was in partnership with her.

Thomas Given, who had supplied the sum of £7 10s 0d already mentioned, said that he spoke on behalf of the plaintiff to some of the wholesale people.

If the evidence had stopped here, I should have arrived at the clear conclusion that there was none to support the jury's finding, and nothing would have remained but to send the case back for trial for the sole purpose of assessing damages on this branch of the claim.

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Edward Williamson, for the defendants, swore that he went to Pat Devine's in September, 1926, to seize on foot of the decree and that Mrs. Devine said the furniture belonged to her brother-in-law, and that in May, 1927, Pat was behind the counter giving orders to a traveller.

A traveller from M'Mullan & Company said he had supplied, i.e. with goods, P. Devine from 11th December, 1926, to September, 1927.

There is here a small piece of evidence against plaintiff's claim if she really admitted on the occasion of the first seizure that the furniture belonged to her brother-in-law, but not a question was put to her on cross-examination by Mr. Williamson as to this admission and no opportunity was afforded plaintiff of contradicting, qualifying or explaining away this evidence.

I further think that, although furniture only is mentioned in the question, it was in the contemplation of both parties and in the mind of the learned judge that the finding of the jury applied to stock as well as to furniture. But what was present to the minds of the jury in answering this question? If furniture included stock or any other effects belonging to the plaintiff, it was impossible to give a negative answer to the question put to them if they paid any heed to the evidence. There was the uncontradicted and unimpeached evidence of plaintiff that linen and watches, her property, had been seized. On the other hand, if furniture meant furniture and nothing else, there was no trial of the action either as to the ownership of the stock or of the linen and watches.

Accordingly, I am of opinion that there must be a new trial of the action on the ground that if the jury intended the answer to Question No. 1 to apply to stock their verdict was against the weight of the evidence and was such that the jury, viewing the whole of the evidence reasonably, could not properly find—*Metropolitan Ry. Co.* v. *Wright* (1)—and, if the jury did not intend that answer to apply to the stock, then the case as regards this was not tried at all. I do not leave out of account the argument pressed upon us by Mr. Williamson as to the course of the trial: even that must yield if by insisting on it a manifest injustice is done to either party.

(1) 11 A.C. 152

Is the plaintiff entitled to damages for trespass?

On her behalf it is contended that the plaintiffs in the civil bill, the defendants in this action, had elected to execute the decree through the sheriff's bailiff, that this election prevented them having recourse to special bailiffs, but that if it were open to them in these circumstances to have recourse to the employment of special bailiffs, the appointment in this case was bad by reason of the non-residence in the County of Tyrone of the persons nominated to act as such.

The execution of decrees and the appointment of sheriff's bailiffs are regulated by the Civil Bill Courts Procedure Amendment Act (Ireland), 1864, 27 and 28 Vict., c. 99.

Section 4 provides that decrees are to be executed by the sheriffs of the several counties or by their bailiffs appointed under the Act and by no other persons, and a special bailiff was to be appointed by the chairman in any case where the sheriff was a party in any proceedings by civil bill and where a decree was made against him.

Section 5 prescribes the mode of appointment of bailiffs by the sheriffs, and in particular it is provided that the persons so appointed must be resident in the county of the sheriff making the appointment, and one at least was to be resident in each quarter sessions district of the county, and powers were given to each sheriff to dismiss his bailiffs and to appoint others or additional bailiffs.

Section 6 gives power to the chairman to fine any of the bailiffs for neglect or misconduct, and section 7 makes provision for the publication of the name and place of abode of every bailiff appointed, dismissed or suspended, such publication to be in one or more newspaper or newspapers published or circulated within the county, and also makes provision for the posting in specified places of lists of such bailiffs.

The importance of appointing as bailiffs persons resident in the county, known to the sheriff, under his control, removable by him and liable to be fined by the chairman for neglect or misconduct, need not be insisted on. All these provisions are well calculated to provide for the better execution of the decrees and orders of the courts, which is one of the main objects of the Act.

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The preamble to The Civil Bill Courts Procedure Amendment Act (Ireland), 1871, 34 & 35 Vic., c. 99, recites that it is expedient to amend the procedure of the civil bill courts in Ireland and to enlarge the provision for the better execution of the decrees and orders of the said court, and section 4 provides that the Act of 1864 and this Act shall, with the reservations mentioned, be read together as if they were one Act.

Section 5 provides that the sheriff of every county shall, on the demand of the plaintiff in a decree . . . grant a special warrant to such plaintiff . . . nominating one or more bailiffs to execute the same at the peril of such plaintiff, and the form of the warrant is given in the schedule to the Act, but it is provided that the chairman of quarter sessions, on application to him in open court, may within his jurisdiction by indorsement on the decree . . . direct that no special warrant shall be given to the plaintiff, and where such indorsement is made the sheriff shall not grant a special warrant.

Section 6 provides that in case it shall appear upon the trial of any action or proceeding that any person appointed by the sheriff or nominated at the peril of the plaintiff or defendant as bailiff, or, to put it shortly, any sheriff's bailiff or any special bailiff has been guilty of any misconduct which in the opinion of the chairman ought to disqualify him from being thereafter appointed to execute decrees, the said chairman shall make an order that the sheriff of the county or city in which such person resides shall not thereafter appoint any such person as bailiff under the Act of 1864 or at plaintiff's or defendant's peril to execute any decree or dismiss, and such order shall be entered by the clerk of the peace in a book to be kept by him and a copy of the order is to be transmitted by him to the sheriff, and section 7 provides that it shall be the duty of the sheriff, on being sworn into office, to obtain from the clerk of the peace a list of the persons so disqualified.

If the residence qualification is not applicable to special bailiffs in the same way as it applies to sheriff's bailiffs, section 6 would be useless for preventing the repetition of acts of misconduct by special bailiffs who had been guilty of such misconduct in a county in which they did not reside.

Suppose that upon the trial of any action or proceeding, it appeared to the Chairman of County Tyrone that in his opinion Williamson and Fisher have been guilty of misconduct which ought to disqualify them from being thereafter appointed to execute decrees, the said chairman is to make (shall make) an order that the sheriff of the county or city in which they reside shall not thereafter appoint them as bailiffs (either sheriff's or special), that is to say, the Chairman for County Tyrone is to order the sheriff of the county of the city of Belfast, where these men reside, not to appoint them as bailiffs under either the Act of 1864 or at the plaintiff's or defendant's peril, but there would be nothing to prevent the sheriff of County Tyrone from re-appointing these men special bailiffs as often as he might be asked to do so.

If the sheriff of the city of Belfast in the case under discussion were to refuse to obey this order, what would be the remedy? If he obeyed the order, how could it be said that there is here any provision for the better execution of the decrees and orders of the court in County Tyrone?

Then again the clerk of the peace, who is to keep the book, must be the clerk having jurisdiction where the offending bailiffs reside, but how will the keeping of this book or the transmission of its contents to the sheriff in any way conduce to the better execution of the decrees and orders of the court in which such decrees and orders were made? If in fact Williamson and Fisher had been found guilty of misconduct by the chairman, no record of this finding would be available under section 7 for a new sheriff of County Tyrone on being sworn into his office, i.e., as the law now stands for the under sheriff.

The Act of 1871 is silent on the question of the residence of special bailiffs, but as it and the Act of 1864, which is explicit as to the residence of sheriff's bailiffs, are to be read together, and as the appointment of special bailiffs to execute decrees in a county in which they are not resident would give rise to many anomalies and inconveniences, I am of opinion that the warrant authorizing and empowering these men, Williamson and Fisher, to execute the decree was bad in law on the ground that they

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were not resident in County Tyrone and that in entering plaintiff's house they committed a trespass.

In this view of the case it is unnecessary to consider whether the defendants (plaintiffs in the civil bill), having once made an election to execute by sheriff's bailiff, have debarred themselves from employing special bailiffs even though regularly appointed.

It is also unnecessary to consider whether, under any circumstances, sheriff's or special bailiffs armed with a regular warrant are entitled in law to enter the house of one spouse for the purpose of executing a decree against the goods of the other spouse. I decide this branch of the case solely on the question of the invalidity of the warrant.

In the result there must be a new trial of the action All questions on this trial will be open as regards the claim for damages for illegal seizure but the claim for trespass will be sent back merely for the assessment of damages.

The costs of the former trial are to abide the result of the new trial, and the parties must respectively bear their own costs of the argument in this court.

Solicitor for the plaintiff : *John J. Rea.*
Solicitor for the defendants : *S. J. Diamond.*

J. McC.

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Nov. 13, 20.

IN THE MATTER OF THE TRUSTS OF AN INDENTURE DATED 30th DAY OF MARCH, 1886.

COUNTY COUNCIL OF LONDONDERRY AND OTHERS v. M'GLADE AND OTHERS (1).

Public Elementary School—Transfer to local education authority—Power of majority of trustees to bind minority—Religious instruction in schools—Education Act (Northern Ireland), 1923 (13 & 14 *Geo.* 5, *c.* 21)—*Government of Ireland Act*, 1920 (10 & 11 *Geo.* 5, *c.* 67).

The managers and a majority of the trustees of B. Public Elementary Schools decided that the schools should be transferred to the County Council of L. under the provisions of the Education Act (Northern Ireland), 1923. Four trustees refused to join in the necessary deed of conveyance.

Held that the majority of the trustees could require the minority to join in the deed for the purpose of transferring the schools under the Act.

And *Held* that the provisions of the Education Act (Northern Ireland), 1923, which relate to the transfer of schools, are not void under Section 5 of the Government of Ireland Act, 1920.

ORIGINATING SUMMONS brought by the County Council of Londonderry as the Education Authority for that County and eight of the present trustees under an Indenture of 30th March, 1886, made between the Fishmongers' Company of London and the twelve trustees therein named, against the remaining four present trustees of that Indenture for—

(1) a declaration that the defendants were bound to join with the plaintiff trustees in executing a proper conveyance to the said County Council of part of the lands of Glasvea, in the County of Londonderry, containing 3a. 2r. and 21p. statute measure, with the two school buildings and the two teachers' residences thereon;

(2) an Order compelling the defendants to join in such conveyance; and

(3) an Order, if necessary, that the trusts of the Indenture of 30th March, 1886, be administered by the Court.

(1) In the Chancery Division before Wilson, J.

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By the Indenture of 30th March, 1886, the Fishmongers' Company conveyed to the twelve trustees therein named certain lands and premises on which the Company had erected schools and teachers' residences for the education of the children of their tenants in the district. The trusts mentioned in the deed provided, *inter alia* :—

(1) that the schools should be regulated by the rules and regulations of and be under the control of the Commissioners of National Education or such other person or persons, body or bodies, as might by Act of Parliament or other legal authority be substituted for the Commissioners;

(2) for residences for the teachers who should be appointed to the schools;

(3) for the selection and appointment of trustees, and that four of such trustees should form a quorum;

(4) that a resolution passed by a majority of the trustees present at a meeting thereof, or by the casting vote of the chairman, should be binding;

(5) that if the proper quorum should be present at any meeting all business transacted at the meeting should be legal although the number of the trustees might not be then full;

(6) that there should be one manager of each of the three denominations, namely, one Episcopalian, one Presbyterian, and one Roman Catholic, and a fourth manager of any of these denominations to be selected by resolution of the trustees;

(7) that in the event of any of the schools ceasing for twelve months to be used as a school the trustees should hold such school with the appurtenances, lands, residence and premises attached thereto in trust for the company freed and discharged from the said trusts.

The premises assured by this Conveyance were set out in the schedule thereto and included the said lands of Glasvea with the school houses, teachers' residences and other buildings thereon.

The Rev. William Kelly, rector, and the Rev. William M'Adam, Presbyterian minister, were the managers of the Ballykelly Schools, and the Rev. James J. M'Glade,

P.P., was the manager of the Dunbrock School. The application was confined to the Ballykelly Schools.

The affidavits showed that since the passing of the Education Act, 1923, these schools had been out of repair, and that it was not possible to get the people who used to subscribe voluntarily for their maintenance before the Act, to continue their voluntary subscriptions. Accordingly the managers of these Ballykelly Schools believed it to be in the best interest of the education of the children that these schools should be transferred to the County Council of the County of Londonderry, the Education Authority for that county. In January, 1926, meetings of the trustees were held and those present unanimously decided to transfer the Ballykelly Schools to the Education Authority, and approved a draft agreement for such transfer, which was signed by the chairman and the secretary on behalf of the trustees, and by the managers, the Rev. William Kelly and the Rev. William M'Adam, and sealed by the seal of the County Council of Londonderry as the Educational Authority, and also sealed by the Ministry of Education for Northern Ireland in proof of their consent to the transfer. The Reverend James J. M'Glade was not present at the meetings but wrote a letter protesting against the transfer.

In accordance with the agreement, a deed of transfer was prepared and executed by the plaintiff trustees and tendered to the defendant trustees for execution, but they refused to execute the same, contending that it would be a breach of trust to transfer the schools to the education authority. Fourteen of the children, out of a total of one hundred, were Roman Catholics, and these would no longer be able to attend the schools if such transfer took place, as they would not be sure of getting the religious instruction they had hitherto got under a Roman Catholic teacher supplied by the Protestant manager.

Murphy K.C., *Pringle K.C.* and *Long* for the plaintiffs:—

The trust in this case is of a public character and consequently, even apart from the Education Act (Northern

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Ireland), 1923, the majority of the trustees can bind the minority, *Perry* v. *Shipway* (1). This case was affirmed on appeal (2).

[They also referred to *Attorney-General* v. *Lawson* (3).]

M'Gonigal K.C. (*McGuckin* with him) for the defendants :—

There is no doubt that in the case of a public trust the majority of the trustees can bind the minority, but not for the purpose of putting an end to the trust. The defendants should not be compelled to transfer their property in the schools to a body which was not contemplated by the trust deed.

There is no provision either in the trust deed or in the Education Act of 1923 by virtue of which the defendants can be compelled to part with the schools.

We submit that the provisions of the Education Act which relate to the transfer of schools contravene section 5, sub-s. 1 of the Government of Ireland Act, 1920, and are consequently void.

Pringle K.C. (in reply) :—

The plaintiff trustees are acting within the scope of the trust as amended by the Education Act. The only question is whether the proposals of the majority of the trustees are for the benefit of the beneficiaries. The Education Act merely permits trustees to transfer schools; it does not compel them to do so and consequently the Education Act cannot be said to take property without compensation or offend against any of the provisions of section 5 of the Government of Ireland Act, 1920.

Cur. adv. vult.

Nov. 2.

WILSON, J., having stated the facts, proceeded :—Section 2 of the Education Act (Northern Ireland), 1923, provides that the council of each county shall be a local authority for education, and that the county shall form the education area of the education authority. The powers and duties of an education authority, being the council of a county borough, except as to the raising of money by

(1) 1 Giff. 1
(2) 4 De. G. & J. 353
(3) 36 L.J. (Ch.) 130

rate or loan, the expenditure of money so far as that control may be retained by the education authority (no small part of their entire duty) and the acquisition, holding or disposal of land, are to be exercised and performed through an education committee of the council consisting of twenty-one members appointed by the council from their own body, or partly from their members and partly from other persons as the council may think fit. The powers of an education authority, not being the council of a county borough, are to be exercised and performed through regional education committees to be established under schemes framed by the education authority and confirmed by orders made by the Ministry of Education.

Section 3 provides that the education authority shall make provision for the local management of schools or groups of schools within their area in such manner as the Ministry may approve, and that they may make such provision by the appointment of school committees to carry out or arrange for the lighting, heating, cleansing, repairs, sanitation and general upkeep of school premises and grounds, subject to the direction of the education authority. This section also contains provisions for the appointment and personnel of the school committee and gives the school committee power to advise the education committee or the regional education committee on certain matters. Section 4 provides for inspectors who may advise these various bodies and attend and take part in their meetings if requested, but without power of voting thereat. Having thus established their system of control, section 5 provides that every education authority shall, within six months after the appointed day or on such later date as the Ministry may approve, prepare and submit for approval to the Ministry a scheme for the adequate provision by the education authority (alone or in conjunction with other education authorities) throughout the education area, of all forms of elementary, intermediate and secondary education in day schools. In section 7 "elementary education" is defined as meaning "an education both "literary and moral based upon instruction in the reading "and writing of the English language and in arithmetic, "provided for pupils who are in general of an age below "fourteen years," and a "public elementary school" as

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meaning "a school or department of a school in respect "of which grants are paid out of moneys provided by "Parliament, and in which elementary education is the "principal part of the education provided." Section 8 provides for the maintenance and the efficiency of such public elementary schools and for the supply to them of school apparatus and other necessaries.

Section 14, sub-s. 2, provides that it shall be lawful for the manager of any school which at the appointed day is a national school, notwithstanding any provision contained in any instrument regulating the trusts and management of such school, to make an arrangement under the Second Schedule to the Act for the transfer of the school and any land, buildings or equipment held or used in connection therewith (including a teacher's residence) to the education authority upon such terms and conditions as may be arranged between the parties concerned with the approval of the Ministry.

Section 14, sub-s. 8, provides for the future re-transfer of the schools and premises by the education authority to such persons and upon such conditions as may be specified in the arrangement, and subject to the conditions contained in the Second Schedule. Section 15 provides for a public elementary school within the area which is not a provided school or a transferred school, and which complies with the requirements of the Ministry in relation to public elementary schools and is certified by the Ministry as necessary for the education area. Such a school is called a "voluntary school." Where the education authority is satisfied that such school will be carried on for some period not less than eighteen months as a public elementary school free of any charge to the education authority, over that provided for, and estimates are submitted of the expenditure for lighting, heating and cleansing of the school premises and grounds, and for such equipment, repairs, renewal and general upkeep as should be met from year to year, it is the duty of the education authority, if they have approved of the estimates, to contribute a sum equal to one half of the expenditure within such estimates; provided that if any demand is made by the managers of a voluntary school for a contribution towards any expenditure within such estimates other than for expenditure on

the lighting, heating and cleansing of the school premises and grounds, the education authority shall not make any contribution unless a school committee is appointed in the manner provided by the section, and if no school committee is appointed they shall contribute only such sum as the Ministry may decide. In a transferred or provided school the whole expenditure is provided for, under the Act, out of public funds.

Sections 26, 27, 28 and 29 make provisions in respect to religious instruction in public elementary schools. In the result it would appear that as regards transferred schools the education authority shall not provide religious instruction in any such school, but shall afford opportunities for catechetical instructions according to the tenets of the parents, and for other religious instruction to which those parents do not object. Clergymen and other persons to whom those parents do not object shall have access to the children in the school for the purpose of giving them religious instruction at times to be arranged by the Ministry, but so that no child shall be thereby excluded directly or indirectly from the other advantages which the school affords, and the times at which religious instruction is given shall not form part of the times during which any child is required by the Act and any bye-law made thereunder to attend school. This religious instruction seems fairly difficult to fit in, and it is not to be provided or paid for but left entirely to the voluntary efforts of the clergyman or other person (including teachers at the school) to whom the parents do not object. Notwithstanding this, the education authority must supply and pay for elementary education "both literary and moral based "upon instruction in the reading and writing of the Eng- "lish language and in arithmetic," apparently excluding such works as the English translations of The Bible, St. Augustine, St. Thomas a Kempis and Bunyan's Pilgrim's Progress. It is a thorny subject and theologians don't seem to be agreed that this modern solution is perfect. It is sufficient for me that the Legislature has so provided, and for my purpose they seem to know all about it. Apart from this so very difficult theological problem, the practical result is that a transferred school is completely maintained provided and equipped by the public authority and a voluntary school not transferred gets only half its expenses for

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lighting, cleaning and heating the school and premises and whatever else the school committee or the Ministry may choose to give.

Managers of any school recognized by the Ministry as providing efficient elementary education, notwithstanding any provision in the trust deed of such school, may make arrangements for the transfer of the school under the Second Schedule to the Act. The resolution to transfer these schools was passed unanimously by the trustees present at a meeting duly summoned for the purpose, and at which the two managers of these schools attended. The terms and conditions of the transfer have been arranged between the education authority and the managers and approved of by the Ministry and the majority of the trustees, and the provisions of section 14, sub-s. 2, and the Second Schedule to the Act have been complied with.

If, then, the Education Act (Northern Ireland), 1923, is valid, an agreement has been duly entered into between the managers and the Ministry and agreed to by the parties concerned in accordance with section 14, sub-s. 2, and the Second Schedule to that Act, and the provisions of the trust deed of 30th March, 1886. The Ministry are entitled to have that agreement specifically performed and to have a conveyance of the schools and lands made to the Education Authority by all the trustees of the deed of 30th March, 1886. Four of these trustees, being Roman Catholics, object to execute the conveyance because fourteen of the pupils of these Ballykelly Schools, out of a total roll of one hundred children, are Roman Catholics. These fourteen Roman Catholic children have hitherto received in these schools religious instruction from a Roman Catholic teacher who was appointed by the Protestant managers, and these four trustees fear that if these schools are transferred, no such Roman Catholic teacher will or can be necessarily supplied by the new controlling body—the education authority or the Ministry. It is said that these fourteen children will not in future be able to attend these schools under the new management. It is clear that under the old system the Roman Catholic, or indeed the Protestant, children attending a national school had in law no right to have a paid teacher of their own

communion appointed to give them religious instruction. This has hitherto been done in these Ballykelly Schools merely by the courtesy of the Protestant managers. The battle of the creeds for the control of education in the schools in England and Ireland is a matter of history. They fought so hard and with such vigour and venom that the bewildered laity in the Imperial Legislature, in their endeavour to satisfy the belligerents, has provided that the one subject of instruction on which no public money is to be expended in State aided schools is religious instruction—as to that all the creeds are reduced to a level and that level is not to get any public money. Possibly the Legislature thought that voluntary religious instruction without any payment would be carried on with the same relentless vigour as the war for equal treatment had been maintained. It is now found that that has not been the result. Each creed would like a paid teacher to teach its own particular "ism."

The Parliament of Northern Ireland was established by and subject to the provisions of the Government of Ireland Act, 1920. Section 4 of that Act gives our local Parliament power to make laws for the peace, order and good government of Northern Ireland, with certain limitations, and section 5 prohibits it from making, *inter alia*, a law so as either directly or indirectly to establish or endow any religion or give a preference, privilege or advantage or impose any disability or disadvantage on account of religious belief or religious or ecclesiastical status, or affect prejudicially the right of any child to attend a school receiving public money without attending the religious instruction at that school, or except for certain named public purposes to divert any property or to take any property without compensation, and any enactment which contravenes any of these restrictions, so far as it does so, is void. It is contended by Mr. M'Gonigal that the provisions of The Education Act (Northern Ireland), 1923, which I have already mentioned, contravene this section 5. These Roman Catholic children are quite at liberty to attend these schools without attending any religious instruction unless their parents wish them to attend. If the Northern Parliament enacted that a Roman Catholic should be provided and paid out of public money to teach the children their

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Roman Catholic religion, it would be argued that this was an endowment pro tanto of that religion and imposed a disadvantage on Protestant teachers and gave an advantage to Roman Catholic teachers who might be candidates for that post. Such a law if enacted by our local Legislature would under section 5 be void. It is the Imperial Legislature alone that can repeal or modify section 5 of The Government of Ireland Act, 1920. Mr. M'Gonigal further contends that the transfer of these schools would be taking away from these Roman Catholic children the property of the schools without compensation. The answer is clear, viz. :—

(1) These children had never any property in these schools; and

(2) No property in these schools or legal rights to attend these schools is taken away from these children.

They can attend the instruction given there without attending any religious instruction of which they or their parents or guardians disapprove; the can attend any Roman Catholic religious instruction which their church or their co-religionists may voluntarily provide. It is not in the power of our local Legislature to provide either paid Roman Catholic or paid Protestant religious instruction in a transferred school which is maintained by public money. The Education Act (Northern Ireland), 1923, does not therefore contravene any of the provisions of section 5 of the Act of 1920. The religious instruction of these Roman Catholic children will have to be provided voluntarily in the future as it was in the past by some private arrangement or contrivance for it never was a legal right. This seems to be the political result of the drawn battle of the creeds for supremacy which ended in equality outside the reach of any assistance from public money.

I am therefore of opinion that there is no ground good in law to justify the four trustees who are defendants in refusing to execute the deed, already executed by the rest of the trustees, or to carry out the transfer of these schools to the education authority in pursuance of the agreement duly entered into between the managers, the education authority and the trustees with the approval of the Ministry.

I therefore order the defendant trustees to execute the conveyance transferring these schools to the education authority of the County of Londonderry within fourteen days from the service upon them of this order, and I further order and direct that in the event of the defendants or any of them refusing or neglecting to execute the conveyance within the time aforesaid the Registrar of the Court do execute the same on their behalf, and I direct the defendants to pay to the plaintiffs the costs of and incidental to these proceedings and order thereon.

Solicitor for the plaintiffs: *W. A. Lane.*
Solicitor for the defendants: *William O'Kane.*

J. D. C.

C.A. 1928

Nov. 14, 19.

IN THE GOODS OF ROBERT KERR ECCLES, Deceased (1).

Practice—Limited administration—Grant for the purpose of transferring the legal estate, and without citing the next of kin.

Three new trustees of a will had been appointed in 1875, and the trust estate vested in them. Two of these trustees died prior to 1907, and the third R.K.E., being desirous of retiring from the trust, R.S.C. and W.C. were in that year appointed new trustees. This appointment was subsequently discovered to be invalid. The legal estate was never divested from R.K.E., who died intestate in the United States in 1915, and no representation had been raised to his estate.

The Court of Appeal (Andrews and Best, L.JJ.), reversing the order of Wilson J., gave liberty to a person, who represented some of the beneficiaries, to apply for a grant limited to conveying the legal estate and without citing the next of kin.

MOTION. This was an application on behalf of Alfred Edward Brett for a grant of letters of administration of the estate of Robert Kerr Eccles, deceased, to Alfred Edward Brett, a trustee for some of the beneficiaries of the estate of Michael Murphy, deceased, limited to the conveying to the trustees of the will of Michael Murphy, of the freehold property of the deceased, subject to the trusts of his will.

Michael Murphy, late of Belfast, was at his death seised by virtue of a lease for lives renewable for ever (which lease was afterwards converted into a fee farm grant), of a plot of ground in the city of Belfast, with the houses and buildings thereon, subject to the yearly rent of £73 17s 0d and a renewal fine of £1 5s 0d, and was also seised under a lease for lives renewable for ever of another plot of ground in Belfast, subject to the yearly rent of £21.

Michael Murphy died on the 10th September, 1836, having made a will, by which he appointed the Right Reverend William Crolly, William Brown, and William Campbell his executors and trustees, and devised and bequeathed to them all his real and personal property to hold upon the trusts of the will, which contained an express power of appointment of new trustees.

(1) In the Court of Appeal before Andrews and Best, L.JJ.

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GOODS OF ROBERT KERR ECCLES.

Probate of the will was on the 4th April, 1837, granted to William Brown and William Campbell. New trustees were appointed on the 6th May, 1848, and on the 18th September, 1875, a further appointment was made by which Robert Kerr Eccles, John M'Anerney, and Michael Campbell were appointed new trustees, and the trust estate vested in them. Prior to 1907 John M'Anerney and Michael Campbell died, and as Robert Kerr Eccles was desirous of retiring from the trust, Robert Shaw Campbell and William Campbell were appointed new trustees by an Indenture dated 13th July, 1907, but the legal estate in the trust property had not been vested in the new trustees, and remained vested in Robert Kerr Eccles, who died in California in 1915, intestate. No representation was raised to his estate in this country, and no information could be obtained as to who were his next of kin.

In 1916 a suit was commenced in the Chancery Division of the High Court of Justice in Ireland for the administration of the trusts of the will of Michael Murphy, deceased, and inquiries were directed as to the persons beneficially entitled to his estate. The purported appointment of new trustees in 1907 was found to be invalid, and Robert Shaw Campbell, William Campbell, and Robert Henry Brett were appointed trustees of the will.

The trust estate comprised, *inter alia*, the above mentioned freehold property, which the court had ordered to be sold, and as the legal estate had never been divested from Robert Kerr Eccles, and as no representation had been raised to the estate of Robert Kerr Eccles, it became necessary to have some person appointed as his personal representative, for the purpose of conveying the legal estate to the new trustees.

Porter, in support of the motion:—

I submit it is not necessary to follow the various beneficial interests. The invalidity of the appointment of new trustees in 1907 does not affect the transfer of the legal estate. The outstanding legal estate must be got in before the property can be put up for sale.

I rely on *In re Vereker* (1), which was very similar to the present case. In *Goods of Ryves* (2) a grant was

(1) [1896] 1 I.R. 200 (2) 3 Ir. J.N.S. 184

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Goods of Robert Kerr Eccles.

made limited to assigning a trust term without citing the next of kin, who was abroad, of the sole surviving trustee, who had died intestate.

I submit that the order should be made in the present case giving liberty to apply for letters of administration limited to conveying the legal estate, and without citing the next of kin. Robert Kerr Eccles was the last survivor of the three trustees appointed by the 1875 deed, the legal estate remained in him, and was not divested by the invalid appointment of 1907.

Andrews L.J.: We are prepared to give the order as asked for.

The Court made the following order:—

"This Court, having extended the time for hearing the said appeal to the 14th day of November, 1928, did order that the said Alfred Edward Brett be at liberty to apply for a grant of letters of administration to the estate of the above named Robert Kerr Eccles, who died on the 22nd day of December, 1915, intestate, without citing the next of kin of the said deceased, limited to the purpose of conveying to the said Robert Shaw Campbell, William Campbell and Robert Henry Brett, as such trustees as aforesaid of the said will of the said Michael Murphy, the legal estate vested at the date of his death in the said Robert Kerr Eccles, deceased, in such of the real property devised by the said will of the said Michael Murphy, deceased, as is now subject to the trusts thereof."

Solicitors for the applicant:—*L'Estrange & Brett.*

J. M'C.

ESTATE OF GUNNING (1).
(N.I. 361.)

C.A. 1929

Jan. 16, 29.

Land purchase—Tithe rentcharge—Redemption of—Consent of Treasury—Necessity for—Land Law (Ireland) Act, 1887 (50 & 51 *Vict.*, *c.* 33) *s.* 15 (2), *s.* 16—*Land Law (Ireland) Act*, 1896 (59 & 60 *Vict.*, *c.* 47) *s.* 31 (3), (5), (8), *s.* 37—*Tithe Rentcharge (Ireland) Act*, 1900 (63 & 64 *Vict.*, *c.* 58) *s.* 3, *s.* 9—*Irish Land Act*, 1903 (3 *Ed.* 7, *c.* 37) *s.* 64, *s.* 98—*Northern Ireland Land Act*, 1925 (15 & 16 *Geo.* 5, *c.* 34).

The estate of G., which, vested in the Land Purchase Commission by virtue of the Northern Ireland Land Act, 1925, was subject to two ecclesiastical tithe rentcharges. The vendor served notice of motion to redeem these charges, and the redemption price was fixed by the Judicial Commissioner at 19 years' purchase in each case, the Ministry of Finance objecting.

Held (by the Court of Appeal), that ecclesiastical tithe rentcharges cannot be redeemed under the Land Purchase Acts without the consent of the Ministry of Finance as representing the Treasury.

APPEAL by the Ministry of Finance as representing the Treasury, from an order of the Judicial Commissioner fixing the redemption price of two ecclesiastical tithe rentcharges, payable out of the estate of John Elgee Gunning, at nineteen years' purchase. The consent of the Treasury to such redemption had not been obtained.

Murphy, *K.C.*, and *MacDermott* for the appellants:—The redemption of ecclesiastical tithe rentcharges is dealt with by section 15 of the Land Law (Ireland) Act, 1887, which by sub-s. 3 provides that no such redemption shall be made without the consent of the Treasury. Such consent was rendered unnecessary by section 37 of the Land Law (Ireland) Act, 1896, in certain circumstances, but we submit that section 9 of the Tithe Rentcharge (Ireland) Act, 1900, again required the consent in every case and that such consent is still necessary. This was the view expressed by Meredith, J., in *In re Fitz-Gerald's Estate* (2). We also rely on the judgment of Wylie, J., in *In re Locke's Estate* (3), in which he stated that he considered himself bound to hold that the Treasury consent was necessary.

(1) In the Court of Appeal before Moore, L.C.J., and Andrews and Best, L.JJ.
(2) [1902] 1 I.R. 444 at p. 449 (3) [1914] 1 I R. 302 at p. 304

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Monroe, K.C., and *Dougherty* for the respondent :—

It is true that until the passing of the Land Law (Ireland) Act, 1896, tithe rentcharge could only be redeemed under section 15, sub-s. 2 of the Land Law (Ireland) Act, 1887. We submit, however, that tithe rentcharge is a superior interest as defined by section 31, sub-s. 8, of the Act of 1896. It is provided by sub-s. 3 of the same section that the power of redemption, given to the Land Commission by sections 15 and 16 of the Act of 1887, shall extend to superior interests. Accordingly, we contend that the power of redemption under section 16 of the Act of 1887 was extended to tithe rentcharge. The latter section was not affected by section 9 of the Tithe Rentcharge (Ireland) Act, 1900, and, consequently, ecclesiastical tithe rentcharge can still be redeemed under section 16 of the Act of 1887, under which the consent of the Treasury was never necessary. By virtue of section 64 of the Irish Land Act, 1903, the redemption price can be determined by the Judicial Commissioner. It would be very surprising if one superior interest were omitted from a general scheme for the redemption of such interests. *Attorney-General for Ireland* v. *Proby* (1) is a case in our favour. We also rely on the judgment of Wylie, J., in *In re Edgeworth's Estate* (2), which strongly supports our contentions.

Murphy, K.C., in reply :—

The contention that section 31 of the Land Law (Ireland) Act, 1896, extends the application of section 16 of the Land Law (Ireland) Act, 1887, to tithe rentcharge, cannot be sustained in view of the judgment of O'Brien, L.C., in *Earl of Carysfort's Estate* (3). It is obvious that when the Tithe Rentcharge (Ireland) Act, 1900, was passed it was intended by the legislature that the necessity for the Treasury consent to the redemption of tithe rentcharge should be completely restored.

Cur. adv. vult.

(1) [1906] 2 A.C. 468
(2) [1917] 1 I.R. 270 at p. 272
(3) [1914] 1 I.R. 96 at p. 107

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MOORE, L.C.J.: The point involved in this case is a simple one, and can be stated in a few words.

Mr. Commissioner Megaw, properly following a decision of his predecessor, the late Mr. Crookshank, by order of the 16th November, 1928, decided that the consent of the Treasury to redemption of tithe rentcharge, as provided by section 15, sub-s. 2, of the Land Law (Ireland) Act, 1887, is no longer necessary. This question involves his right to fix the redemption price at nineteen years' purchase, a figure to which the Finance Minister of Northern Ireland objects.

On reference to section 15, sub-s. 2, of the Act of 1887, it will be seen that it relates to charges, the ownership of which was vested in some public department, and, therefore, the consent of that department to redemption was made necessary. In the case of the Land Commission the consent required was that of the Treasury.

Section 16 dealt in a similar way with all other rentcharges—i.e., those not vested in any public department—and for this reason, in dealing with such, the consent of no public department was necessary.

Mr. Monroe, in the course of his ingenious, but to me unconvincing, argument, admits that up to the passing of the Land Law (Ireland) Act, 1896, tithe rentcharge could only be redeemed under section 15, sub-s. 2, of the Act of 1887, but, as I understand him, he contends that by virtue of section 31 of the Land Law (Ireland) Act, 1896, sub-s. 3 and sub-s. 5, and the definition in sub-s. 8 of "superior interest," tithe rentcharge could be redeemed under either section 15 or 16 of the Act of 1887. It is true that he is confronted by section 9 of the Tithe Rentcharge (Ireland) Act, 1900, which, in effect, restores to section 15 the provision for Treasury consent, but he says nothwithstanding that he can still go on under section 16, where no departmental consent was ever necessary. He also referred us to section 64 of the Irish Land Act, 1903, and the definition clause in section 98 of that Act, both dealing with section 16 of the Act of 1887, but in my judgment not in any way material to the present case. The whole question, therefore, comes down to this, did section 31 of the Act of 1896, so far as tithe rentcharge was concerned, give the vendor an option to redeem under either section 15 or under section 16, as he pleased?

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Very much the same argument was put forward by the Crown in the *Earl of Carysfort's Estate* (1), with a widely different object. The Crown argued that under the Act of 1896, sections 15 and 16 of the Act of 1887 became, so to speak, fused, and that, therefore, the necessity for the consent of the Treasury under section 15 became carried on or projected into proceedings under section 16. This point was effectively dealt with in the judgment of the Lord Chancellor (now Lord Shandon). He says:—"It is argued by counsel for the Crown that "because section 15 of the Act of 1887 contains, with "reference to the redemption of Crown rents, quit rents, "and tithe rentcharges, a certain limitation, not ex- "pressly repealed, for the protection of the Crown, "therefore, as the words of sub-s. 5 of section 31 of the "Act of 1896 provide that the price or compensation to "be paid in respect of a superior interest, or of any "apportioned part thereof, shall be determined 'in the "manner provided by the said sections' for the re- "demption of annuities, &c., we are not only to bring "over section 15 and section 16 of the Act of 1887, but "also to project into section 16 when reading it with "section 31 of the Act of 1896, as amended by the Act "of 1903, this limitation inserted for the protection of "the Crown in section 15, but absent from section 16.

"To my mind the whole of that argument, if it has "any force at all, must depend on the use of the word "'sections,' in the plural, in section 31. I see no other "justification for it.

"In my judgment the words 'the said sections' must "be read distributively. The intention of the legislation "was to introduce the machinery of both sections 15 and "16, but these words certainly do not, to my mind, bind "the Court to hold that it is necessary to project from "section 15 of the Act of 1887 a prohibition with regard "to the redemption of Crown interests, and introduce "that prohibition into the later legislation, so as actually "to restrict the express terms of the definition clause of "the Land Act of 1903."

I agree with every word of these passages. I am of opinion that section 31 of the Act of 1896, while it

(1) [1914] 1 I.R. 96 at p 106

abolished the necessity for consent, did not give any option. I also think that the Tithe Rentcharge (Ireland) Act, 1900, restored expressly to section 15 the provision as to departmental consent so far as tithe rentcharge was concerned, without extending such provision for the first time to section 16, and I can find nothing in the Land Act of 1903 to repeal by implication anything in the Act of 1900 which is still on the Statute Book.

For these reasons I think that the consent of the Treasury, as represented by the Ministry of Finance in Northern Ireland is still necessary, that the redemption can not proceed without it, and that the appeal against the learned Commissioner's decision should be allowed.

This, of course, leaves open the second question which is concerned only with the rate at which the redemption price was fixed, as to which it is not now necessary to express an opinion.

As this is a test case and will govern many others, I do not think that we should make the vendor pay any costs of this appeal.

ANDREWS, L.J.: I agree. By section 15, sub-ss. 1 and 2, of the Land Law (Ireland) Act, 1887, the Land Commission were empowered to apportion and order the redemption of (inter alia) any tithe rentcharge, to which land sold under the Land Law (Ireland) Acts was subject, at a price to be fixed by the Land Commission; but by section 15, sub-s. 3, redemption of tithe rentcharge payable to the Land Commission (i.e., of ecclesiastical as distinguished from impropriate tithe rentcharges) could not be made without the previous consent of the Commissioners of the Treasury. Section 16 of the same Act dealt with the like apportionment and redemption of any annuity, rentcharge, or rent. These interests or charges were, as pointed out by both Lords Parker and Wrenbury in *Attorney-General for Ireland* v. *Proby* (1), the property of a private owner as distinguished from a Crown charge, and no similar consent to redemption was, accordingly, requisite. The redemption price under this section was to be fixed by agreement between the parties, or, on consent, by the Land Commission, or, in the

(1) [1916] 2 A.C. 468 at pp. 474 and 478

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absence of such consent, by arbitration. In my opinion the subject matter of the two sections was wholly different, as was also the method of ascertainment of the redemption price. The two sections are in fact mutually exclusive; and the powers of apportionment and redemption therein contained were for the most part dependent for their exercise on the discretion of the Land Commission.

Section 31 of the Land Law (Ireland) Act, 1896, deals with the compulsory extinguishment of superior interests. Sub-s. 3 "extends" the powers of apportionment and redemption given to the Land Commission by sections 15 and 16 of the Act of 1887 to such superior interests, which by sub-s. 8 are defined to include (inter alia) "any "rent, rentcharge, annuity, fees, duties, or services "payable or to be rendered in respect of the land sold "to any person, including Her Majesty and her suc- "cessors." Sub-s. 5 provides that the price or compensation to be paid in respect of a superior interest or of any apportioned part thereof shall be determined in the manner provided by *the said sections* (i.e., sections 15 and 16 of the Act of 1887) for the redemption of annuities, rentcharges, and rents. I have not the slightest doubt as to the accuracy of the view expressed by O'Brien, L.C., in *Earl of Carysfort's Estate* (1), that the words "the said sections," must be read distributively. The sections remained distinct from, and independent of one another; and in particular, the machinery for and prohibition or restriction with regard to the redemption of ecclesiastical tithe rentcharge remained unaffected by section 31. That this is the true view is, I think, confirmed by the wording of section 37, sub-s. 1, of the same Act, which, in modifying the restriction on redemption, provides that where the Land Commission, in pursuance of section 15 of the Act of 1887, order the redemption of tithe rentcharge at a price not less than twenty times the net amount of such tithe rentcharge . . . the consent of the Treasury shall not be required to such redemption. We have here a clear declaration by Parliament that the redemption of ecclesiastical tithe rentcharge still falls to be effected under the machinery of section 15; and in my opinion we can-

(1) [1914] 1 I.R. 96 at p. 107

not attribute to the legislature the inconsistency involved in Mr. Monroe's argument of (a) introducing by special section a limited modification of Treasury control in regard to the redemption of such a tithe rentcharge when effected under what had admittedly hitherto been the only available machinery for the purpose (viz. section 15); and of (b) so amending and extending the machinery for redemption of such tithe rentcharge that, if the procedure under section 16 were adopted, Treasury consent would be in every case unnecessary. I can find no principle to support the view contended for; and I feel in no way compelled to such a conclusion by the words of section 31.

Subsequent legislation seems further to confirm the view which I have expressed. Section 3 of the Tithe Rentcharge (Ireland) Act, 1900, introduced a new principle of variation of tithe rentcharges, and section 9 provides that section 37, sub-s. 1, of the Act of 1896, which, as the section states, dispenses with the consent of the Treasury to the redemption of tithe rentcharge as therein mentioned, shall not have effect in the case of any tithe rentcharge to which section 3 of the Act of 1900 applies. Here is, in my opinion, a complete restoration of Treasury control in the redemption of all variable tithe rentcharges (see judgment of Meredith, J. in *In re Fitzgerald's Estate* (1)); and it is not, in my opinion, in the slightest degree affected by section 64 of the Irish Land Act, 1903, which contains no reference in terms or otherwise to tithe rentcharges or Treasury consent, but merely modifies the machinery for the redemption of superior interests provided by section 16, sub-s. 3, of the Act of 1887, where the parties do not within the prescribed time agree upon the redemption price.

I do not consider it necessary to make detailed reference to the authorities cited in argument, as none of them was directly concerned with the redemption of tithe rentcharge, which is distinguished from the redemption of Crown rents, quit rents or other Crown charges or reversions by the special legislative provisions to which I have referred. It is true that in *In re Edgeworth's Estate* (2) Wylie, J., in holding that quit rent will be redeemed and the redemption price fixed without the

(1) [1902] 1 I.R. 444 at p. 449 (2) [1917] 1 I.R. 273

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consent of the Commissioners of Woods and Forests, based his judgment on the implied repeal of section 15, sub-s. 3, of the Act of 1887 by section 31 of the Act of 1896; and he states it as his opinion that the Treasury consent under section 15, sub-s. 3, of the Act of 1887 to the redemption of tithe rentcharge is no longer required. So far as this judgment relates to tithe rentcharge it is merely obiter; it entirely ignores the provisions of sections 3 and 9 of the Tithe Rentcharge (Ireland) Act, 1900; and as regards the true meaning and effect of the sections of the earlier Acts referred to in this judgment it is at variance not only with the view of the learned author of Chaytor on The Tithe Rentcharge Act, 1900 (see page 23), but also with the considered opinion of Meredith, J., in *In re Fitzgerald's Estate* (1), to which I have already referred, and which I prefer to follow.

The order of the Judicial Commissioner must, accordingly, be discharged.

BEST, L.J.: The question for decision in this case is whether two ecclesiastical tithe rentcharges payable out of the above estate can be redeemed without the consent of the Treasury.

Mr. Commissioner Crookshank in *Colonel Robert Wallace's Estate* (2) decided in November, 1926, that he had power to redeem without such consent, and following this decision Mr. Commissioner Megaw, by an order dated the 16th day of November, 1928, fixed the redemption price of the two tithe rentcharges at nineteen years' purchase. From this order the Ministry of Finance, as representing the Treasury, have appealed on the ground that their previous consent to the redemption had not been obtained.

Section 15, sub-s. 2, of the Land Law (Ireland) Act, 1887, empowered the Land Commission to order the redemption on the sale of lands sold under the Land Law (Ireland) Acts of any Crown rent, quit rent, or tithe rentcharge, and sub-s. 3 provided that no redemption of a tithe rentcharge payable to the Land Commission should be made without the previous consent of the Commissioners of the Treasury.

(1) [1908] 1 I.R. 444 (2) Unreported.

Section 16 of the Act of 1887 similarly empowered the Land Commission to deal with annuities or rent charges to which the lands sold under the said Acts might be subject, and to order the redemption of such annuities or rentcharges, the redemption price being arrived at in one of the modes mentioned in sub-s. 3, but without the necessity of obtaining any consent to such order for redemption.

Section 37, sub-s. 1, of the Land Law (Ireland) Act, 1896, dispenses with the consent of the Treasury to the redemption of tithe rentcharge where the Land Commission, in pursuance of section 15 of the Act of 1887, order the redemption of such tithe rentcharge at a price not less than twenty times the net amount of such tithe rentcharge after making the deduction in respect of rates mentioned in the sub-section. The provisions of section 15 of the Act of 1887 as to consent of the Treasury remain in full force and effect except to the extent just provided for.

If I rightly understand Mr. Monroe's argument it is that tithe rentcharge is a "superior interest" as defined in sub-s. 8 of section 31 of the Act of 1896, that by virtue of sub-ss. 3 and 5 of the same section tithe rentcharge, being such a superior interest, may be redeemed under either section 15 or section 16 of the Act of 1887, and as it may be redeemed under section 16 the redemption price can, by virtue of section 64 of the Irish Land Act, 1903, be determined by the Judicial Commissioner without consent, for that section provides that notwithstanding anything in sub-s. 3 of section 16 of the Act of 1887, if the parties do not within the prescribed time agree upon the redemption price of a superior interest, that price shall be determined by the Judicial Commissioner or the Land Judge, as the case may be. I cannot accept this argument, as it ignores the existence of section 15 of the Act of 1887, while section 37, sub-s. 1 of the Act of 1896 recognises the continued existence and validity of that section and only modifies it to the extent already mentioned.

The matter is put beyond question by sections 3 and 9 of the Tithe Rentcharge (Ireland) Act, 1900. The former of these sections makes the variation of tithe rentcharges

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dependent upon the average percentage of variation of rents declared by the certificate of the Land Commission, and the latter section provides that "Sub-section (1) of "section thirty-seven of the Land Law (Ireland) Act, "1896" (which dispenses with the consent of the Treasury to the redemption of tithe rentcharge as therein mentioned), "shall not have effect in the case of any tithe "rentcharge to which section three of this Act applies." The consent of the Treasury to the redemption of tithe rentcharges is thus restored to the position it was in when the Act of 1887 was passed, and I can find nothing in the Act of 1903 repealing these provisions of the Act of 1900.

I agree that the appeal should be allowed.

Solicitor for the appellants:—*J. H. B. Gunning.*

Solicitors for the respondent:—*S. S. & E. Reeves & Sons.*

J. D. C.

THE KING (JENNINGS) v. THE JUSTICES OF COUNTY ARMAGH (1).
(1928. No. 8.)

K.B.D. 1929

Jan. 18.

Illicit still—Penalty for having possession of—Mitigation of fine—Jurisdiction of justices—Illicit Distillation (Ireland) Act, 1831 (1 & 2 *Wm. IV*, *c.* 55), *s.* 16, *s.* 39—*Finance Act*, 1923 (13 & 14 *Geo. V*, *c.* 14), *s.* 13, *sub-s.* 1.

D. was summarily convicted by justices and fined £1 in respect of an offence under section 16 of the Illicit Distillation (Ireland) Act, 1831. The prosecutor objected to this fine, on the ground that under section 39 of the same Act, the justices could not reduce the penalty to a sum less than £6.

Held, that the justices had jurisdiction under section 13 of the Finance Act, 1923, to impose any penalty not exceeding £500, notwithstanding the fact that section 39 of the Illicit Distillation (Ireland) Act, 1831, limits the power of mitigation by prescribing a minimum penalty of £6.

CERTIORARI: At a court of petty sessions, held at Armagh on the 4th October, 1928, the defendant, John Donnelly, junior, was prosecuted for unlawfully having a still on his premises contrary to the provisions of section 16 of the Illicit Distillation (Ireland) Act, 1831. The justices convicted the defendant, and imposed on him a penalty of £1. On the 30th November, 1928, the prosecutor obtained a conditional order for a writ of certiorari to quash the conviction, on the ground that the justices had no power to inflict a smaller penalty than £6. The justices made a return to the conditional order. The prosecutor now applied to have the order made absolute.

Lowry, *K.C.*, and *Dougherty* for the prosecutor:—

The minimum penalty which the justices had jurisdiction to impose is £6. This is the smallest sum to which the penalty of £100 prescribed by section 16 of the Illicit Distillation (Ireland) Act, 1831, can be reduced by virtue of the power of mitigation contained in section 39 of the Act. Section 13, sub-s. 1, of the Finance Act, 1923, increases the limit of the penalty from £100 to £500, but we submit that this section must be read in conjunction with section 39 of the Act of 1831, and that the

(1) In the Divisional Court before Moore, L.C.J. and Brown, J.

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minimum penalty of £6 still remains. The provisions of the latter section were intended to protect the Crown, and cannot be repealed except by express words.

[They referred to *Rex* v. *Cator* (1) and *Reg.* v. *Hopkins* (2).]

Davison, K.C., and *Chambers* for the respondents :—

Section 13 of the Finance Act, 1923, enables the justices to impose any penalty not exceeding £500, and the clear words of this section cannot be controlled by any earlier Act.

Sub-s. 2 of section 13 of the Act of 1923 creates a new offence, namely that of obstructing an officer of Customs and Excise, and renders the offender liable to a fine not exceeding £100. It is obvious that section 39 of the Act of 1831 cannot apply to this fine, and we contend that it cannot govern any of the other provisions of the Act of 1923.

We submit that the justices had jurisdiction under section 13 of the Act of 1923 to impose any penalty not exceeding £500, and were accordingly entitled to fine the defendant £1.

[They referred to the judgment of Abinger, C.B., in *Henderson* v. *Sherborne* (3).]

Dougherty (in reply) :—

If the legislature had intended to abolish the excise penalty under the Act of 1831 they would have used the word "fine" in section 13 of the Act of 1923, but the word "penalty" is retained.

MOORE, L.C.J., delivered the judgment of the court :—

The defendant in this case, John Donnelly, junior, was on the 4th August, 1928, convicted by a court of summary jurisdiction of an offence under section 16 of the Illicit Distillation (Ireland) Act, 1831, and fined in the sum of £1. On the 30th of November, 1928, the prosecutor obtained a conditional order of certiorari from this Court to bring up and quash the order of the justices on the ground that the minimum penalty which it was in their power to impose on conviction was £6. Cause has now

(1) 4 Burr. 2026
(2) [1893] 1 K.B. 621
(3) 2 M. & W. 236 at p. 239

been shown against this order, and in our judgment the cause as shown should be allowed.

The offence created by section 16 of the Act of 1831 above referred to, was that the person charged not being authorized had in his possession (I refrain from reading the whole section) a still head or worm of a still, and such person "shall forfeit £100, subject to the mitigation hereafter mentioned." The mitigation hereafter mentioned is to be found in section 39 of the same Act—"Be it further enacted that any justice or justices of the peace may when they shall see cause mitigate any penalty incurred for any offence committed against this Act as he or they shall think fit, so as such mitigation shall not in any case reduce such penalty to less than £6." The contention of the Crown is that the justices were bound under this section, if they convicted, to impose a mitigated penalty of not less than £6. We were referred to subsequent statutes, the Illicit Distillation (Ireland) Act, 1857, section 6, and the provisions against illicit distillation in the Revenue (No. 2) Act, 1861, section 18, but beyond showing that the provisions, above referred to, of the Act of 1831 were still in force nothing of moment turns upon them. The cause shown before us on behalf of the justices is based on section 13, sub-s. 1, of the Finance Act, 1923. That section runs thus:—(I omit the words which are not relevant to the present case) "Any person convicted before a court of summary jurisdiction of an offence against section 16 of the Act of 1831 shall be liable to a penalty not exceeding £500." As we all know, it is impossible in dealing with penal sentences to make a hard and fast rule for every case, and justice would not be justice, or at any rate would not be properly administered, if the judge or justices were not enabled to exercise a judicial discretion in the nature of clemency. There are two ways in which this result can be arrived at; the older way, not now so often used, was to impose a definite amount as penalty and then to give the court, so to speak, after sentence, the power of mitigating that amount, as was done by section 39 of the Act of 1831. The other method is, not to impose a fixed penalty for every case, but merely to fix its limits, and under this method there was no necessity for a mitigating

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clause, as the justices had full discretion in imposing any sentence within the statutory limits, and exercised that discretion before sentence. Under section 13 of the Finance Act, 1923, it is plain that the offence under section 16 of the Act of 1831 is still an offence. It is also plain that it can be prosecuted before a court of summary jurisdiction as was done in the present case, and this section provides the second method as an alternative. not necessarily as a substitute, for sections 16 and 39 of the Act of 1831. Accordingly, in the present case no mitigating clause is necessary. Section 39 did not apply. The justices had jurisdiction, under the Act of 1923, to impose any fine that did not exceed the sum of £500, and we think they were acting within their powers by fining the defendant in the sum of £1 only.

We accordingly discharge the conditional order.

Solicitor for the prosecutor :—*John R. Moorhead, Chief Crown Solicitor.*

Solicitors for the respondents :—*Moorhead & Wood.*

J. D. C.

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Nov. 7

1929 Jan. 11

ESTATE OF R. P. WOODSIDE AND OTHERS (1).
(County Antrim. Record No. N.I. 519.)

Mines and minerals—Reservation of—Upper basalt—Stone—Irish Land Act, 1903 (3 *Ed. VII*, *c.* 37) *s.* 13 (3), *s.* 99—*Northern Ireland Land Act*, 1925 (15 & 16 *Geo. V*, *c.* 34), *s.* 16 (1), (2).

The owners of the W. Estate applied to the Land Purchase Commission, under section 16 of the Northern Ireland Land Act, 1925, for an order that on the vesting of the holdings in the Land Purchase Commission, certain mines and minerals, including *inter alia* upper basalt, limestone, and lithomarge, should be excepted. The Land Purchase Commission made an order excepting limestone and lithomarge, but they did not except upper basalt.

Upon the estate there are substantial deposits of upper basalt of considerable value. Until 1911 one of the basalt quarries had been worked, and materials in considerable quantities were raised therefrom and sold to various public bodies for ashlar facings, for wharves and piers, and for square setts. The working of the quarries was interrupted by the death of the owner of the estate in 1911, and also by the financial stringency and restrictions which resulted from the war. At present the working of the quarries could not be carried on profitably, but from the evidence before the Land Purchase Commission it appeared that there was a reasonable probability of the mines being worked within a few years.

The owners appealed from the order of the Land Purchase Commission in so far as upper basalt was not excepted, and there was no appeal from the order excepting limestone and lithomarge.

Held, by the Court of Appeal (Andrews and Best, L.JJ.) that upper basalt is a mineral within the meaning of the Acts of 1903 and 1925, that the rights in relation to the basalt possess a substantial value, actual or potential, and that there is a reasonable prospect of the mines or minerals to which such rights relate being worked or developed within twenty years.

APPEAL from an order of the Land Purchase Commission, dated 31st January, 1928, for an order that in addition to the limestone and lithomarge ordered to be excepted by the Land Purchase Commission, all rights to or in relation to basalt and basalt quarries on or under the holdings which would become vested in the Land Purchase Commission should also be excepted on the vesting of the land in the Land Purchase Commission, and that such rights should not be affected by such vesting.

(1) In the Court of Appeal before Andrews and Best, L.JJ.

C.A. 1929

ESTATE OF R. P. WOODSIDE

The Woodside Estate is situated near Ballycastle, in County Antrim. It is held under certain Landed Estate Court conveyances, which contain express grants of "all mines, minerals and royalties whatsoever." On the estate are substantial deposits of upper and lower basalt, limestone, and lithomarge, which are stated to be of considerable value. Several quarries of these deposits were worked by the owners for many years, until the death of the late Doctor Woodside in 1911, when all working ceased, and has not since been resumed, owing mainly to financial stringency consequent upon the war. In the townlands of Coolmaghon, Cregganboy and Carnmoon are two quarries of columnar basalt from which stone was quarried similar in character to that found at the Giant's Causeway, and suitable for the construction of sea walls and piers, for paving square setts, and for building and other purposes. On one of these quarries the late Doctor Woodside expended about £3,000 in development work. Work at this quarry could be resumed at any time if economic conditions were more favourable. At the present time the quarries could not be operated at a profit; but it appears that there is a reasonable probability of the mines, minerals and quarries being worked within the next few years.

Porter for the owners:—

The Land Purchase Commission refused to make an order excepting basalt, and the only appeal is with regard to basalt. The object of section 16 of the Northern Ireland Land Purchase Act, 1925, was to protect landlords. This Act must be read along with previous Irish Land Acts. The evidence before the Land Purchase Commission, with regard to basalt, was very much stronger than that with regard to limestone. In order to succeed the owners must (1) prove that basalt is a mineral, (2) show that the rights, in relation to mines or minerals, possess a substantial value, whether actual or potential, and (3) show that there is a reasonable prospect of the mines or minerals to which they relate being worked or developed within twenty years. The first point is one of some difficulty. The landlord's right to mines and minerals has always been most carefully guarded in the Irish Land Code. The tenant had only such interest in

the soil as would enable him to cultivate his holding. The tenant had no right to open mines. Section 5 (5) of the Land Law (Ireland) Act, 1881, provided that the landlord was to have the right to enter upon the holding for the purpose of mining or taking minerals, or digging or searching for minerals. The Acts prescribe that the landlord, if he exercises his right to dig for minerals, must make reasonable amends for any damage occasioned thereby. As to the meaning of the term "mineral," Halsbury's *The Laws of England*, vol. 20, pp. 502-3, contains the following statement, "There is no general definition of the term 'mineral.' Any substance which is part of the natural formation of the earth, except the common soil or rock of the country, may be a mineral; and in construing a document or an Act of Parliament it is a question of fact whether any given substance is a mineral or not. The test is what, at the date of the instrument in question, the word meant in the vernacular of the mining world, the commercial world, and landowners; but there are other considerations to be taken into account. The word 'mineral' is susceptible of limitation or expansion, according to the intention with which it is used. The intention may be inferred from the document itself or from consideration of the circumstances in which it was made. In the case of the document itself the inference may be drawn from a comparison of other parts of the document, or from the immediate context. The word most commonly found in immediate collocation with the word 'minerals' is the word 'mines,' as in the phrase 'mines and minerals,' or its equivalent 'mines of minerals.' Although the word 'mine' primarily refers to underground workings, yet so used it does not narrow the meaning of 'minerals,' and the phrase *prima facie* includes minerals which can only be got by surface workings. Moreover, the fact that the owner of the minerals is not entitled to get minerals by surface workings is not sufficient to restrict the meaning of minerals; but the meaning may be restricted by proof of a custom, the existence of which is incompatible with the *prima facie* meaning, or by the particular circumstances of the case being such as to lead to the inference that all minerals cannot have been intended to be referred to."

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Fishbourne v. *Hamilton* (1) decided that, in Ireland, limestone is a mineral, and there is no difference in principle between basalt and limestone. It is quite clear from the Irish cases, including *Staples* v. *Young* (2) and *Shaftesbury* v. *Wallace* (3) that the words in the Act of 1925 cannot be read in their more extended signification. The judgment of Byrne, J., in *Johnstone* v. *Crompton & Co.* (4), is very valuable as throwing light on *Hext* v. *Gill* (5). In the present case the mineral has a value of its own independent of and separate from the soil. In interpreting the Act of 1925 the Court should not take away from the landlord anything that he has, unless compelled to do so, and regard must be had to the circumstances in which the Act was passed. Under section 16 (2) of the Act of 1925 the onus lies upon the landlord to show that these rights are of substantial value, and that there is a reasonable prospect of the mines or minerals to which they relate being worked or developed within twenty years, and I submit that this onus has been discharged. In *Caledonian Railway* v. *Glenboig Union Fireclay Company* (6), *Lord Loreburn, C.*, said in his speech at p. 299, "The principle of the decision in this House in the *Budhill* (7) and *Carpalla* cases (8) seems to me to have been this: the Court has to find what the parties must be taken to have bought and sold respectively, remembering that no definition of 'minerals' is attainable, the variety of meanings which the use of the word 'minerals' admits of being itself the source of all the difficulty. It must be taken that what the railway company intended to get and the landlord intended to give was the land under the line, for the object was to give, not a wayleave, but a support. I say this speaking generally. Upon the other hand, if anything exceptional in use, character, or value was thereunder, that was reserved, provided it could be included under the word 'minerals' as understood in the vernacular of the mining world, and the commercial world, and the landowner." I submit that the words used by Lord Loreburn apply to

(1) 25 L.R.I. 483
(2) [1908] 1 I.R. 135
(3) [1897] 1 I.R. 381
(4) [1899] 2 Ch. 190
(5) L.R. 7 Ch. App. 699
(6) [1911] A.C. 290
(7) [1910] A.C. 116, 125
(8) [1909] 1 Ch. 218

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the present case. In *Symington* v. *Caledonian Railway* (1), Earl Loreburn, C., said at p. 92, "The judgment of the Court of Session seems to me to amount to this, that in no circumstances can freestone be a mineral within the meaning of the statute. I cannot accept that proposition. It is always a question of fact. I think myself it is very seldom that freestone is likely to be regarded as a mineral, but whether it be so or not is to be decided in regard to the particular facts of the case." I submit that on the evidence and on the authorities the court should decide that this upper basalt is a mineral.

[He also referred to *Attorney-General* v. *Salt Union Limited* (2).]

MacDermott for the Treasury:—

I agree that basalt is a mineral. It is impossible to reconcile the numerous decisions. I submit the following propositions: (a) the general meaning of the word "mineral" is sufficient to cover basalt, (b) the wide use of the word "mineral" may be restricted by deed or by Act of Parliament, (c) unless there is something which clearly limits the wide sense of the word "mineral" in an Act of Parliament, then the wide sense should prevail. Regard must be had to the circumstances, and to the intention of the parties. Even where the landlord has no claim to the substance, it does not become the property of the tenant, it goes to the Land Purchase Commission. The onus is upon the landlord, and he has to satisfy the court that these rights are of substantial value, and that there is a reasonable prospect of the mines or minerals to which they relate being worked or developed within twenty years.

[He also referred to *Darvill* v. *Roper* (3), *Attorney-General for the Isle of Man* v. *Mylchreest* (4), *Lord Provost and Magistrates of Glasgow* v. *Farie* (5).]

Cur. adv. vult.

(1) [1913] A.C. 87
(2) [1917] 2 K.B. 488
(3) 3 Drewry 294
(4) 4 A.C. 294
(5) 13 A.C. 657

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ANDREWS, L.J. : The problem as to the classes of workings and substances which properly fall within the expression "mines and minerals" is one which has long bewildered the legal profession. It has sometimes arisen in the interpretation of demises or reservations in leases, and sometimes in the construction of statutes such as the Lands Clauses, Railway, and Finance Acts. In the present case we are invited to consider its meaning as used in the 16th section of the Northern Ireland Land Act, 1925, which, by reference, throws us back upon the 13th section of the Irish Land Act, 1903. Before considering the legal aspect of the case, however, I shall mention its salient facts.

The Woodside Estate is situate about three miles north-west of Ballycastle, in County Antrim. It is held under certain Landed Estate Court conveyances, in all of which there are express grants of "all mines, minerals and royalties whatsoever." It contains substantial deposits of upper and lower basalt, limestone, and lithomarge, which are alleged to be of considerable value. Several quarries of these deposits were worked by the owners—members of the Woodside family—for many years, until the death of the late Dr. Woodside in the year 1911, when all working ceased, and has never since been resumed, owing, it is alleged, to financial stringency and shipping difficulties consequent upon the war. In the townland of Coolmaghon and in the lands of Cregganboy and Carnmoon are two quarries of columnar basalt from which stone was quarried of an approved character similar to that at the Giant's Causeway, suitable for sea walls or piers, paving square setts, building, and other purposes. On the second of these quarries the late Dr. Woodside expended the sum of about £3,000 in opening and development work. Operations at this quarry could be resumed at any time if economic conditions in trade and shipping were more favourable. At the present time they could not be carried on at a profit; but Mr. Robert Patton Woodside states in his affidavit that there is a reasonable probability of the mines, minerals and quarries being worked within the next few years; and in his oral testimony he amplifies this statement by saying without hesitation that so far as he can see workings will be resumed within

twenty years—the period mentioned in section 16 (2) of the Northern Ireland Land Act, 1925, to which I shall later refer.

There was a considerable volume of further evidence in regard to the nature of limestone and lithomarge (the latter of which lies geologically between the upper and lower basalt), and also in regard to the probability of a resumption of working of the quarries of all the stones referred to; but I find it unnecessary to set out any of this evidence in detail, as the Land Purchase Commission have held by their order of 31st July, 1928—and from this finding there is no appeal—that limestone and lithomarge are minerals which should be excepted to the vendor on the vesting of the holdings in the Commission. It must, therefore, be assumed that it was proved to the satisfaction of the Commission that the rights in relation to these substances possess a substantial value, actual or potential, within section 16 (2) of the Act of 1925, and that there is a reasonable prospect of these minerals being worked within twenty years. In the arguments before us it was fairly and properly admitted by Mr. MacDermott, who represented the Commission, that the evidence as to the value of upper basalt and the probable early resumption of the basaltic quarries was stronger than that given in reference to either limestone or lithomarge; and, accordingly, it was not contested that if we varied the order of the Commission by holding upper basalt also to be a mineral it should likewise, on the facts of the present case, be excepted to the vendor on the vesting of the holdings in the Commission.

In a supplemental affidavit filed by leave for use in this court, Mr. Maxwell Given, a civil engineer, who claims to have considerable experience of the mineral deposits of County Antrim, states that upper basalt, limestone, and lithomarge are generally referred to by surveyors, engineers, and landowners as minerals, whilst lower or primary basalt is not so designated. For upper basalt he claims a very high value, as the deposits of this mineral are not very common in the British Isles. Basalt is a rock of igneous origin, which Darwin has described as "only lava which has flowed beneath the sea." The peculiar hexagonal prismatic jointing to be found in

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basaltic columns in County Antrim is, however, mainly characteristic of intrusive masses of basaltic igneous rock, although it may less frequently be represented by lavas. It is due to the shrinkage of the molten material on solidification and cooling. It differs essentially in character from limestone, which, speaking in general terms, is a soft rock of organic formation, consisting to a substantial extent of the debris of the skeletons of animals, and varying according to the nature of the creatures whose remains they contain. It seems to me to be in the nature of a legal anomaly, and in this I think my opinion would be generally endorsed, that a substance which is in nature or origin organic, and, as such, connected with vital processes, should be held to be a mineral, whilst the purely inorganic basalt, containing considerable metalliferous qualities, should be wholly excluded from that category. Does the law compel this result?

I approach, with much diffidence, the review of a mass of authority, which as great an authority as Lord Loreburn, in *North British Rly* v. *Budhill Coal & Sandstone Co.* (1), regarded as in some respects irreconcilable, and from which he considered it was not possible to extract any uniform standard. Indeed, the same noble lord, in *Caledonian Rly.* v. *Glenboig Union Fireclay Company* (2), expressed it as his opinion that no definition of minerals is attainable.

In the first place, however, I think it is clear that we need not be concerned in the present case with the meaning of the word "mines" in section 16 of the Act of 1925, or of the word "mining" in section 13 (3) of the Act of 1903; for it is well settled that, whatever be the meaning of the word "mines" when used alone, the putting of this word before the word "minerals" does not restrict the meaning of this latter word (see judgment of Mellish, L.J., in *Hext* v. *Gill* (3)). It was in this same case that the learned Lord Justice gave his oft-quoted definition of the term "minerals," expressing his opinion as to the result of the authorities to be that a reservation of "minerals" includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless

(1) [1910] A.C. 116 at pp. 123, & 125 (2) [1911] A.C. 290 at p. 299
(3) L.R. 7 Ch. App. 699 at p. 712

there is something in the context or in the nature of the transaction to induce the court to give it a more limited meaning. On the facts of that case, he held that the surface, and all profit that could be got from cultivating the surface, or building on it, or using the surface, was intended to be conveyed, but that the right to everything under the surface, including the substance in question—china clay—and to all profit that could be got from digging anything out from under it, was intended to be reserved. In *Attorney-General for The Isle of Man* v. *Mylchreest & Others* (1), the Privy Council held that the term "minerals" in the saving clause of the Act of Settlement of 1703, which contained the words "mines and minerals of what kind and nature soever, quarries and delfs of flagg, slate, or stone" did not include clay and sand; though it was recognised that the word "minerals" in its scientific and widest sense may include substances of this nature, and, when unexplained by the context, or by the nature and circumstances of the transaction, or by usage (where evidence of usage is admissible), would in most cases do so. "But," added Sir Montague E. Smith, "the word has also a more limited and popular meaning, which would not embrace such substances, and it may be shewn by any of the above mentioned modes of explanation that in the particular instrument to be construed it was employed in this narrower sense." In that case the Court held the word "minerals" must from its content be given a more limited meaning; for if the word were intended to be used in its widest signification it was obviously unnecessary to make specific mention of flagg, slate, and stone.

The definition of "minerals" given by Mellish, L.J., was criticised by Lord Halsbury, C., in *Lord Provost and Magistrates of Glasgow* v. *Farie* (2), on the ground that it introduced as one element the circumstance that the substance could be got at a profit, which would make it possibly a mineral one year and not a mineral the next; and he expressed his cordial approval of the view suggested by James, L.J., that what is meant by "mines and minerals" in a grant is a question of fact—what these words meant in the vernacular of the mining world, the

(1) 4 A.C. 294. (2) 13 A.C. 657 p. 670

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commercial world, and landowners, at the time when they were used in the instrument. In the same case Lord Watson said that the only principle which he could extract from the authorities was "that in construing a reservation of mines or minerals, whether it occur in a private deed or in an Inclosure Act, regard must be had, not only to the words employed to describe the things reserved, but to the relative position of the parties interested, and to the substance of the transaction or arrangement which such deed or act embodies." "Mines and minerals," he added, "are not definite terms; they are susceptible of limitation or expansion, according to the intention with which they are used." At page 679, Lord Watson asks the question "what in ordinary acceptation is understood to be the surface crust of the earth which overlies its mineral strata?" He answers his own question thus:—"It is, of course, conceded that vegetable mould, which commonly forms a large ingredient of the topmost layer of the crust, is not within the exception; but it is also the fact that in many districts the cultivable soil is mainly composed of clay, which is a mineral, in this sense, that it is an inorganic substance. I have come to the conclusion that the expression 'the land' cannot be restricted to vegetable mould or to cultivated clay; but that it naturally includes, and must be held to include, the upper soil, including the subsoil, whether it be clay, sand, or gravel." The significance of these words, I may say, will be more apparent when we turn to section 13 (3) of the Act of 1903. Again Lord Macnaghten, at p. 690, after discrediting commercial value or profit as a test, says that "it has been laid down that the word 'minerals,' when used in a legal document, or in an Act of Parliament, must be understood in its widest signification, unless there be something in the context or in the nature of the case to control its meaning." Also at p. 697, after referring to the serious injury it would probably be to the vendor if he were compelled to include his mines in the sale to a railway company because of the impassable barrier he would be selling in the middle of his mines, he points out that the company would not require mines as such, and adds, "These considerations, however, do not apply to the case

of gravel and clay, and things of that sort, which may be termed surface minerals. Remove surface minerals from under the track, and the railway becomes a heap of rubbish. For the very existence of the line it is necessary that they should be left undisturbed."

Whether the criticism by Lord Halsbury of the definition of Mellish, L.J., is justified or not was questioned with much force by Bowen, L.J., in *Earl of Jersey* v. *Neath Union* (1), and I think that the Lord Justice is right when he says that Mellish, L.J., did not say or mean "that the test was whether the minerals could be worked at a market profit at the time, but whether they had a use and a value of their own independent of and separable from the rest of the soil." Though I am aware that Lord Halsbury did not accept this view in *In re Todd, Birleston & Co. and N.E. Ry Co.* (2), it was accepted as a correct statement of the law by Byrne, J., in *Johnstone* v. *Crompton & Co.* (3), when he said that the proper test to apply in determining whether a substance was a mineral or not was whether when separated from the soil it had a use and value of its own independent of and separable from the rest of the soil.

There are several other cases to be found in the English Reports, some of which reached the House of Lords, but I shall refer to only one—*North British Ry.* v. *Budhill Coal and Sandstone Co.* (4), in which Lord Loreburn, after reviewing several of the authorities, says that a variety of tests had been propounded:—"Is the substance in common parlance a mineral? Is it so considered by geologists? Is it a substance of any peculiar value?" After emphasising the importance in these cases in looking at the purpose which was in view when the Act was passed, he states that in determining whether exceptional substances are minerals the court must consider "what these words meant in the vernacular of the mining world, the commercial world, and landowners." Lord Gorell also stresses the importance of looking at the object of the section of the Act of Parliament, and suggests and examines six possible interpretations of the term "minerals," ultimately accepting the view that the true

(1) 22 Q.B.D. 555 at p 562
(2) [1903] 1 K.B. 603 at p. 607
(3) [1899] 2 Ch 190
(4) [1910] A.C. 116

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interpretation of the term "mines and minerals" in the Railway Act then under consideration was the meaning of the words "in the ordinary sense in which they are understood and used by landowners and those engaged in mining and commerce."

Of the Irish cases which were cited to us the first, and, perhaps, the most important was *Fishbourne* v. *Hamilton* (1), in which it was held by the Court of Appeal, affirming in this respect the judgment of the Vice-Chancellor, that beds of limestone were included in a reservation of "mines and minerals" in a head grant of the year 1712, whether they were got by quarrying or by surface working. The actual decision is, however, no conclusive authority in the present case, not only because the substance was different, but also because the words "mines and minerals" there occurred in a deed, whilst in the present case they are to be construed in an Act of Parliament, in which a different context may readily produce a different result. The case is of importance, however, in this, that the Court of Appeal recognised the binding authority of *Hext* v. *Gill* (2), nothwithstanding the criticism levelled against it in *The Provost of Glasgow* v. *Farie* (3). I would also like to refer to one passage in the judgment of the Vice-Chancellor as an answer to an argument which was addressed to us:—"I cannot," he said, "give any force to an argument, much pressed on me by the plaintiff, that a different interpretation is to be given to the word 'minerals' when the subject of the grant is in a limestone district, from what should be given to it elsewhere. It would lead to endless confusion if we had to construe a reservation of minerals according to the preponderance of particular minerals in that district. The argument would go to this, that where limestone is the formation, the word minerals does not include limestone, but that where it does not preponderate it does include it."

In *Shaftesbury* v. *Wallace* (4) brick clay lying some fifteen inches beneath the surface was held to be included in a reservation of all mines of lead, ore, tin, and other minerals, coal, and all quarries of marble, freestone,

(1) 25 L.R.I. 483
(2) L.R. 7 Ch. App. 699
(3) 13 A.C. 657
(4) [1897] 1 I.R. 381

limestone, and building stones, slates and other quarries whatsoever. Here the important words were "mines of minerals," which the Vice-Chancellor referred to as a somewhat inaccurate expression. "Every mine," he said "must be a mine of minerals, but every mineral is not necessarily found in a mine. 'Minerals'," he added, "is not restricted by being coupled with mines in the ordinary expression 'mines and minerals'."

In *Staples* v. *Young* (1) the substance held by the Court of Appeal not to be included in the reservation by deed of "mines and minerals" was sand. In his judgment Walker, L.C., expressed it as his considered view "that *Hext* v. *Gill* (2) and the rule laid down by Mellish, L.J., in that much discussed case have not been overruled, and must govern the construction of every grant to which they apply, but that those rules must be applied, taking into account the circumstances of the case, the true nature of the transaction, and the real object of the parties as evidenced by the subject matter of the grant or letting." Fitzgibbon,, L.J., said that the question was "really one of fact, namely, what was the subject matter which was reserved or passed under the designation of mines and minerals by the instrument in question. In determining that question, among other circumstances, evidence of the nature and character of the land at the time is admissible and is persuasive." "'Surface'," he added, "has been used as a generic word to describe what is not 'mines and minerals,' It is not a strict definition, because the surface itself may in some places be the out-crop of minerals; but for the present purpose 'surface' describes intelligibly, though not strictly, what is not mines and minerals." Holmes, L.J., declared that there was no matter of legal controversy as to which it is more easy to find judicial decisions than the question of what is comprised in the term 'mineral,' and, he added, as to which the decisions give so little real guidance. After considering the definition of Mellish, L.J., in *Hext* v. *Gill* (2), and Lord Halsbury's comments thereon, the learned lord justice said:—"In truth, any attempt to lay down in a sentence a rule of general application to a subject-matter which in its nature is diversified and multiform can never be completely satisfactory."

(1) [1908] 1 I.R. 135 (2) L.R. 7 Ch. App. 699

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With this review of the authorities—admittedly lengthy, but by no means exhaustive—I pass to a consideration of the relevant sections of the Irish Land Code. It does not suffice, in my opinion, to commence with the Act of 1903; for light not only may be, but, in my opinion, clearly is, thrown by the earlier Acts both upon the nature and subject matter of the tenant's holding, and also upon the meaning of the term "minerals" which are excepted or reserved to the landlord. It is for this reason, rather than for what the sections actually enact, that I make the following references. Section 26 of Deasy's Act enacts that no tenant for an estate less than a perpetual estate made after 1st January, 1861, should, without the landlord's consent, open, dig for any unopened mines, minerals or quarries, or (except as thereinafter provided) remove the soil or surface or subsoil of the lands unless the lands should have been leased for the purpose of being so used and enjoyed. Section 27 provides that where any lease should be made on or after 1st January, 1861, of lands containing mines or minerals which at the time of the making of the lease should have been opened or worked, it should be lawful for the tenant to work and dig for, and remove the mines or minerals, unless otherwise provided. Section 28 further provides that where any lease or demise should be made after 1st January, 1861, of lands containing quarries or beds of stone, limestone, sand, marl, gravel or clay, which at the time of the making of such lease should have been opened or worked, it should be lawful for such tenant, unless otherwise provided, to work, dig for, and use such quarries or beds so far as may be necessary or useful for the purposes of agriculture and good husbandry, and the lawful erection or repair of necessary buildings on the lands, but not for the purpose of trade or manufacture, or for profit or sale, unless the right so to use shall have been expressly granted. By section 32 of the same Act where lands are granted or leased, excepting mines and minerals, the landowner may open, dig for and work such mines and minerals found in or upon the lands and carry away the ore thereof, or lease the mines, making compensation to the tenant. By section 14 of the Act of 1870 it is enacted that where a tenant of a holding held under a tenancy

from year to year existing at the passing of the Act is evicted by reason of the persistent exercise by such tenant of any right not necessary to the due cultivation of his holding and from which such tenant is debarred by express or implied agreement, such eviction shall not be deemed a disturbance; so also where such a tenant is evicted by reason of the tenant's unreasonable refusal to allow the landlord to enter upon the holding for any of the purposes specified, of which the first two are:—

Mining or taking minerals; and

Quarrying or taking stone, marble, gravel, sand or slate.

Section 3 of the Notice to Quit (Ireland) Act, 1876, which refers to the service of a notice with a view to resumption of part of the tenant's holding for improvements, is also instructive, as the landlord's rights of resumption extend to and include under different classifications

(a) the opening or working of any coal, ironstone, limestone, or other mineral, or of a stone quarry, clay, sand, or gravel pit; and

(b) the obtaining of brick earth, gravel, or sand.

A somewhat similar combination of words is to be found in section 5 of the Act of 1881, where, amongst the statutory conditions of a tenancy, is set out the right of the landlord to enter upon the holding for the purposes (*inter alia*) of mining or taking minerals or digging or searching for minerals, and also of quarrying or taking stone, marble, gravel, sand, brick clay, fire clay, or slate. The same section provides that during the continuance of a statutory term all mines and minerals, coals and coal pits, subject to such rights in respect thereof as the tenant, under the contract of tenancy subsisting immediately before the commencement of the statutory term, was lawfully entitled to exercise, shall be deemed to be exclusively reserved to the landlord.

It is, I admit, quite impossible to find any uniformity in the meaning of the term "mines and minerals" in the sections to which I have just referred. In section 26 of the Act of 1860 the words "or quarries" are added to the words "unopened mines, minerals," and have presumably a different signification. This view is borne out by sections 27 and 28, the former of which relates to

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opened mines or minerals, whilst the latter refers to opened quarries or beds. It is also important to note that the latter section refers in express terms to stone, limestone, sand, marl, gravel, or clay. Again section 32, after empowering the landlord to open, dig for and work excepted mines and minerals, adds the pregnant words "and to carry away the ore thereof," words which apply to metals, but are wholly inappropriate to stone, gravel, sand or clay.

Section 14 of the Act of 1870 is to the like effect, as in it "Mining or taking minerals" is treated as something distinct from "Quarrying or taking stone, marble, gravel, sand, or slate." On the other hand, the words "coal, ironstone, limestone" in section 3 of the Act of 1876 are followed by the words "or other mineral," which clearly implies that limestone is, at least for the purpose of that section, to be regarded as a mineral. Then follows a reference to something which the legislature evidently regarded as different in character from a mineral, namely, "A stone quarry, clay, sand, or gravel pit." Lastly, section 5 (5) of the Act of 1881 draws a similar distinction in conferring on the landlord the right of entry for (amongst others):—

(a) "Mining or taking minerals"; and

(b) "Quarrying or taking stone, marble, gravel, sand, brick, clay, fire clay, or slate."

From a careful perusal of these several enactments I am of opinion that a distinction is drawn throughout the statutes between

(a) Mines and minerals; and

(b) Quarries or beds of stone, sand, gravel or clay;

but that there are certain stones which, either by reason of their metallic elements or composition, such as ironstone, or from their general acceptance in the mining and commercial worlds, and possibly also from judicial recognition, such as limestone, are to be regarded for the purposes of the Irish Land Code as falling within the former rather than the latter class.

With these conclusions before me, I now pass to the Irish Land Act, 1903, and, in particular, to sections 13 (3) and 99 thereof. The former section occurs in part I of the Act, which by section 100 is to be construed as

one with the Land Purchase Acts, included in the definition of which are several of the earlier Acts to which I have already referred. Section 13 (3) provides that on the sale, under the Land Purchase Acts, of any land . . . . . "comprised in an estate by the owner of the estate, there shall be reserved, in the prescribed manner, to the Commission the exclusive right of mining and taking minerals, and digging and searching for minerals, on or under that land, and the said right shall be disposed of by the Commission in manner thereafter to be provided by Parliament." Thus, it was the intention of Parliament that mineral rights should be vested in the Commission instead of going with the reversion to the tenants, the policy evidently being that this small return should be given to the State and, therefore, to the taxpayer, for what the State was doing in the interests of both landlord and tenant; and it was probably also felt that these rights could be much better developed by the State or their lessees than by small proprietors.

The operation of the section is, however, limited by the proviso that it should not apply:—

(a) to any demesne or other land resold in pursuance of section three of the Act; or

(b) to any such right which constitutes a superior interest or which is vested in the Crown; or

(c) to any stone, gravel, sand or clay.

A further proviso confers on the vendor the right to receive 25 per cent of any rent, purchase money, or other net profit received by the Land Commission in respect of same.

The meaning and effect of this section must be considered in conjunction with section 99, which, so far as material for our present purposes, provides that nothing in the Act shall affect:—

(a) any mineral rights which are not in the possession or enjoyment of the vendor at the time of sale; or

(b) any mine or quarry which is being worked or developed by the vendor at the time of sale.

These sections provide restrictions or limitations upon the general vesting of the fee simple of the land in the Land Commission under section 16 (1), or in the tenant

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purchaser under section 24 (1) of the Act of 1903; and, indeed, section 16 (1) (d) makes the vesting expressly subject (*inter alia*) to "the provisions of this Act with respect to minerals."

The drafting of sections 13.(3) and 99 is unfortunate, the result, doubtless, of the introduction of amendments to the original bill; but the intention of the legislature would appear to have been that on the sale by the Land Commission or by the owner of an estate to the tenants there should, speaking in general terms, be excepted and reserved from the vesting in fee in the tenant purchaser the exclusive right of mining and taking minerals, which right should be vested in the Commission. But it was felt that upon such general provision for vesting in the Land Commission there must be grafted certain exceptions to prevent undue interference with vested interests. The first of such exceptions was where the mining right constituted a superior interest which could not be redeemed. The second was where it was already vested in the Crown. The third was where it was not in the possession or enjoyment of the vendor at the time of sale. The rights of third parties could not be confiscated or taken without their consent. The fourth was where a mine or quarry was being worked or developed by the vendor at the time of sale. In this case it would be unfair that the vendor should lose not only the minerals but also all the money he had sunk in their development. Fifthly and lastly, was the case of any stone, gravel, sand or clay.

There is little or no doubt as to the policy of the legislature in regard to the first four of the above exceptions, or as to the reasonableness and wisdom of that policy; but there is room for much difference of opinion in regard to the meaning of the last exception. Are the words "any stone" to be read in their natural and comprehensive sense, so as to include all classes of stone—even those which, like limestone and ironstone, were held by previous judicial authority to be, or were treated by earlier provisions of the land code as being minerals? If this be so, it necessarily limits the operation of the section, and, accordingly, the class of substance which passes under it to the Land Commission, to metallic or

ore producing minerals. Or in the construction of the words "minerals" and "stone" are we, in the absence of express provision to the contrary, to have regard to previous authority and enactment? In my opinion the proposition has only to be stated in this way to bear its own reply.

If it was intended that new meanings should be assigned to these terms in the Act of 1903, the legislature should have said so by means of a clear and unambiguous definition clause. In its absence, Parliament must be presumed to have legislated with full knowledge of the then existing law, and with the intention of assigning to these terms a similar meaning to that which they then bore. In my opinion the proviso excepting stone, gravel, sand, or clay was introduced into the section in the interests of the tenant-purchaser for the purpose of preserving to him the rights which he already possessed in these inorganic substances as then interpreted, not for the purpose of conferring new rights in respect of new or additional substances.

My conclusions may be summed up as follows. Prior to the Act of 1903, if the mineral rights were not reserved by a superior grant, two parties, and two only, were interested in them—the landlord and the tenant. Under this Act, on the occasion of a sale, a third party, namely, the Land Commission also became interested in substances which were at that time regarded as minerals under the Land Code. What the Commission, however, acquired was something from which neither landlord nor tenant was deriving any benefit, profit or use at the time of the sale, something which was not being worked or developed, and which was, accordingly, of a more or less speculative character, and had at any rate only a prospective mining value. It was, in a word, the establishment of a system of nationalisation of undeveloped mines and minerals. Any right from which the landlord derived actual benefit or of which he was in actual enjoyment, either personally or by his lessee, was expressly preserved to him by the words of section 99 (b):—That nothing in the Act should affect any mine or quarry which was being worked or developed by the vendor at the time of sale. In the case of undeveloped

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mines which the landlord believed to possess some real potential value, the landlord had also the safeguard that, if he so desired, he could refuse to sell; and it was really to provide an inducement to him to sell in such cases that the proviso was introduced which declared him entitled to receive 25 per cent of the net profits received by the Land Commission. On the other hand, any right possessed by or benefit accruing to the tenant was preserved to him when he became a peasant proprietor by proviso (c) to section 13 (3):—That the section should not apply to any stone, gravel, sand, or clay. Indeed, I am prepared to go further, and to say that under the joint operation of this latter proviso and the vesting order or fiat of the Land Commission, the purchasing tenant would acquire the absolute and exclusive interest in all ordinary stone which does not fall within the category of minerals as above defined, and which was not being worked or developed by the vendor in a quarry at the time of the sale.

Such is the law as I conceive it to be under the Act of 1903; and it only remains to be considered to what extent it was affected by the Act of 1925. In no respect does it alter the law as to the substances which should be regarded as minerals; but the Act was one of compulsion, and the landlord was, accordingly, no longer in a position to decline to sell if he considered that the undeveloped mines and minerals possessed a substantial potential value. Without amendment this would in many cases have resulted in something approaching confiscation of rights, which, though previously unexercised, were of undoubted value. Accordingly, the legislature in its wisdom enacted by section 16 (2) that if in such a case there was a reasonable prospect of the mines or minerals being worked or developed within twenty years the Land Purchase Commission might make an order excepting the rights in respect thereof on the vesting of the holding in the Land Commission.

In holding upper basalt to be a mineral within the Acts of 1903 and 1925, I conceive that I am not only acting in conformity with the earlier provisions of the Land Code in regard to mines and minerals, but am giving effect to the purpose or object which I conceive the legislature had

in view in the enactments of 1903 and 1925. Upper basalt is, I am satisfied, a substance which has a use of its own independent of and separable from the rest of the soil, and is exceptional in use, value, or character.

Further, on the evidence in this case it is generally referred to in the vernacular of the mining world, and commercial world, and landowners as a mineral. Satisfying all these important tests laid down by the eminent judicial authorities whom I have quoted, the conclusion that upper basalt is a mineral seems to me to be irresistible.

Further, in the present case we have no difficulty in holding, on the evidence and admission of Mr. MacDermott, that the rights in this upper basalt possess a substantial potential value, and that there is a reasonable prospect of it being worked or developed within the specified period of twenty years.

In my opinion, therefore, we ought to vary the order of the Land Purchase Commission by adding upper basalt to limestone and lithomarge as substances, all rights in which on or under the holdings should be excepted on the vesting of the land in the Land Purchase Commission, and should not be affected by such vesting.

BEST, L.J.: This is an application to vary the order, dated the 31st day of July, 1928, made by the Land Purchase Commission by ordering that, in addition to the limestone and lithomarge excepted as therein, all rights to or in relation to basalt and basalt quarries on or under the holdings, which will become vested in the Land Purchase Commission in this matter shall also be excepted on the vesting of said land in the said Commission, and that such rights shall not be affected by such vesting.

By section 16 (1) of the Northern Ireland Land Act, 1925, any rights to or in relation to mines or minerals on or under a holding, which on a sale by agreement under the Land Purchase Acts, would be reserved to the Commission, pursuant to section 13 of the Act of 1903, shall . . . save as herein provided, vest in the Commission on the vesting of the holding in them . . . and shall be reserved to the Commission . . .

By sub-section (2) of the same section, if the Commission on the application of the owner " is satisfied that any

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such rights possess a substantial value, whether actual or potential, and that, although they are not being exercised at the time of the application, there is a reasonable prospect of mines or minerals to which they relate being worked or developed within twenty years thereafter, they may make an order directing that all or any of the rights as therein specified shall, to the extent therein mentioned, be excepted on the vesting of the holding in the Commission, and they shall be so excepted accordingly, and shall not be affected by any such vesting."

The rights under section 16 of the Act of 1925 cannot be reserved to the Land Purchase Commission unless they would have been reserved to the Land Commission under section 13, sub-s. (3), of the Irish Land Act, 1903. That sub-section provides that "on a sale under the Land Purchase Acts of any land by the Land Commission . . . . there shall be reserved . . . . to the Commission the exclusive right of mining and taking minerals and digging and searching for minerals on or under that land . . . Provided that this sub-section shall not apply

(c) to any stone, gravel, sand or clay."

There are three points for determination in the case.

1st.—Is basalt a mineral within the meaning of these sections, or does it as a stone come within proviso (c) in section 13, sub-s. (3), of the Act of 1903?

2nd.—If it be a mineral, and if the proviso be not, therefore, applicable to it, do the rights in relation to it possess a substantial value, whether actual or potential?

3rd.—If the previous question be answered in the affirmative is there a reasonable prospect of the mines or minerals to which such rights relate being worked or developed within twenty years?

It will be advisable to refer here shortly to the evidence given in the case.

The Woodside Estate is situate north-west of Ballycastle in the county of Antrim, and is held on Landed Estate Court conveyances, in all of which there are express grants of "all mines, minerals and royalties whatsoever." Upon the estate there are substantial deposits of

limestone, lithomarge and basalt, which is divided into upper and lower basalt, and these deposits, excepting lower basalt, are said to be of very considerable value. One of the basalt quarries was formerly worked by water power, which is at present available. Materials in considerable quantities were raised in this quarry, and were sold up to the year 1910 or 1911 to various public bodies, and in particular it appears that these materials are suitable when dressed for ashlar facings for wharves and piers, and also for square setts for very heavy road traffic. The working of the quarries was interrupted by the death of a former owner of the estate, and also by the financial stringency and restrictions which supervened as a result of the war.

Just at present the working of the quarries could not be carried on profitably, but the evidence given on affidavit appears to show that there is a reasonable probability of the mines, minerals and quarries, being worked within a few years, and Mr. Robert Patton Woodside states without hesitation that, so far as he can see, workings will be resumed within twenty years.

It is unnecessary to deal with the evidence given as to the nature of lithomarge and limestone, or in regard to the probability of a resumption of the work in the quarries relating to these substances, because the Land Purchase Commission, by their order of 31st July, 1928, have held that limestone and lithomarge are minerals which should be excepted to the vendor on the vesting of the holdings in the Land Commission, and from this decision no appeal has been taken.

Upper basalt (but not lower basalt) is generally referred to by surveyors, engineers and land owners as a mineral, and it is the former kind that has been or can be used as stated.

For the purpose of finding out what is meant by "mines and minerals" in the Land Code Mr. Porter cited numerous decisions, both English and Irish, in some of which this question arose, where there was a reservation of mines and minerals by deed, and in others where such reservations were contained in Acts of Parliament?

One of the earliest and best known cases on the subject is *Hext* v. *Gill* (1). Lord Justice Mellish, at page 712,

(1) L.R. 7 Ch. App. 699

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states as a result of the authorities that a reservation of minerals includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the court to give it a more limited meaning. It was held in that case that a reservation of all mines and minerals within and under the premises included china clay.

James, L.J., at p. 719, entirely concurs with the conclusions and reasoning of the Lord Justice, and, referring to the authorities which had been reviewed by him, he says that but for these authorities he (Lord Justice James) should have thought that what was meant by "mines and minerals" in such a grant was a question of fact, what these words meant in the vernacular of the mining world, the commercial world, and landowners at the end of the last (18th) century, upon which he is satisfied that no one at that time would have thought of classing clay of any kind as a mineral.

In *The Lord Provost and Magistrates of Glasgow* v. *Farie* (1), which was a case arising under the 18th section of The Waterworks Clauses Act, 1847, Lord Halsbury, L.C., throws doubt on the accuracy of the definition of mines and minerals given by Mellish, L.J., and refers with approval to the words just cited from the judgment of James, L.J.

"In *Fishbourne* v. *Hamilton* (2) it was held that beds of limestone were included in a reservation of mines and minerals in a grant of the year 1712, whether they were got by quarrying or by surface working, but I refer to this case not because it is any conclusive authority in the present case—the substance being different and the reservation occurring in a deed—but because in it the Court of Appeal recognised the binding authority of *Hext* v. *Gill* (3). Lord Ashbourne, at p. 502, says: These expressions of the Lords Justices (that is in *The Earl of Jersey* v. *Guardians of the Poor of Neath Poor Law Union* (4)) show that they wished to put it distinctly that *Hext* v. *Gill* (3) was still law, and he adds: "I do not deem it necessary myself to say more than that I think the case is binding upon this Court."

In *Shaftesbury* v. *Wallace* (5) the Vice Chancellor, at

(1) 13 A.C. 657
(2) 25 L.R.I. 483
(3) L.R. 7 Ch. App. 699
(4) 22 Q.B.D. 555
(5) [1897] 1 I.R. 381

p. 402, says "I think it must be now assumed, notwithstanding some doubts that have existed on the subject, that the word 'minerals' in a deed uncontrolled by any restrictive context, or by the nature of the transaction, or by custom, was correctly interpreted by Mellish, L.J., in *Hext* v. *Gill* (1)," and in that case brickclay was held by the learned Vice Chancellor to be included in a reservation of all mines of lead, ore, tin and other minerals, coal, and all quarries of marble, freestone, limestone and building stones, slates and other quarries whatsoever, and he observed in that case that "the expression 'mines of minerals,' is somewhat inaccurate, that every mine must be a mine of minerals, but every mineral is not necessarily found in a mine. 'Minerals' is not restricted by being coupled with mines in the ordinary expression 'mines and minerals.' The word 'mine,' though primarily meaning an underground chamber in which minerals lie, has long since been extended to mean the mineral substances lying in mines, and is equivalent to a seam or bed of a particular mineral."

In the case of *Staples* v. *Young* (2) it was held by the Court of Appeal, reversing Ross, J., that sand in the holding was not included in the reservation of mines and minerals, but it is pointed out by Holmes, L.J., at p. 155, that the nature of the soil was such that if it were to be held that sand is included in the excepted minerals, there would be left no subject matter for the operation of the grant.

In *Johnstone* v. *Crompton & Co.* (3) the reservation was of all mines and minerals within or under the said land, and for the purpose of obtaining water the defendants had commenced to construct a bore hole eighteen inches in diameter, and had already bored through a stratum of red rock and a layer of coal six to eight inches in thickness, and it was held that although the substances in question could not be worked at a profit, they fell within the reservation in the lease as being substances which had "a use and a value of their own independent of and separable from the rest of the soil."

Byrne, J., having discussed *Hext* v. *Gill* (1), and referred to the cases in which it has been criticised, asks

(1) L.R. 7 Ch. App. 699
(2) [1908] 1 I.R. 135
(3) [1899] 2 Ch. 190

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at p. 198, "Am I to inquire whether the coal as it now exists beneath the soil can be got so as to be sold at a profit? I think not. I think it is a substance which has, when separated from the soil, a use and a value of its own independent of and separable from the rest of the soil; and that this is the proper test to apply"; and he adds that he thinks that this is the fair result of the authorities.

In *North British Railway Coy.* v. *Budhill Coal & Sand-Stone Coy.* (1) the House of Lords decided that sandstone is not a mineral within the meaning of section 70 of the Railways Clauses Consolidation (Scotland) Act, 1845, which corresponds to section 77 of the English Act of the same year. In this case Lord Gorell, at p. 130, mentions six different interpretations of the word "minerals," which either have been or may be suggested. He discusses and criticises them at length. Further, at p. 134, dealing with the exceptions in the section, he says "the enumeration of certain specified matters tends to show that its object was to except exceptional matters, and not to include in its scope those matters which are to be found everywhere in the construction of railways, such as clay, sand, gravel and ordinary stone. This is emphasized by the use of the term mines." It is worth noting that, if the word "ordinary" before stone be here omitted, we have the same substances as are mentioned in proviso (c) to section 13, sub-s. (3), of the Land Act of 1903.

In *The Great Western Ry. Coy.* v. *Carpalla United China Clay Co., Ltd.* (2), in which it appeared that china clay lying adjacent to and within lands purchased by the appellant railway company was not part of the ordinary composition of the soil of the district, and that its presence was rare and exceptional, it was held as a matter of fact upon the evidence that such china clay was a mineral within the provisions of the Railways Clauses Consolidation Act, 1845, and was, therefore, excepted from the lands conveyed to the railway company.

In the *Caledonian Ry. Coy.* v. *The Glenboig Union Fireclay Co.* (3) it was decided that "minerals" includes

(1) [1910] A.C. 116
(2) [1910] A.C. 83
(3) [1911] A.C. 290

seams of fireclay. Lord Loreburn, C., at p. 299, says "My Lords, the principle of the decision in this House in the *Budhill* (1) and *Carpalla* (2) cases seems to me to have been this: the Court has to find what the parties must be taken to have bought and sold respectively, remembering that no definition of 'minerals' is attainable, the variety of meanings which the use of the word 'minerals' admits of, being itself the source of all the difficulty." At the end of the paragraph his lordship says: "Upon the other hand, if any thing exceptional in use, character, or value was thereunder, that was reserved, provided it could be included under the word 'minerals' as understood in the vernacular of the mining world, and the commercial world, and the landowner."

In *Symington* v. *Caledonian Ry. Co.* (3) it was decided that "whether a particular substance is or is not a 'mineral' within the meaning and for the purpose of sections 70 and 71 of the Railways Clauses Consolidation (Scotland) Act, 1845, is a question of fact to be determined by the evidence."

Accordingly. whatever test be applied, whether that laid down by Mellish, L.J., in *Hext* v. *Gill* (4), or by Byrne, J., in *Johnstone* v. *Crompton & Co.* (5), or by Lord Loreburn, C., in *Caledonian Ry. Co.* v. *Glenboig Union Fireclay Co.* (6), I think it must be held as a matter of fact upon the evidence in this case that upper basalt is a mineral within the meaning of section 13, sub-s. 3, of the Land Act of 1903.

The difficulty, however, still remains that basalt is a stone, and would *prima facie* come within the proviso (c) to the sub-section. The words "any stone, gravel, sand or clay" if taken literally, would include limestone, brick clay and china clay as well as sandstone, but whilst, as appears from the cases cited, the latter has been held not to be a mineral, the former have been held to be minerals.

In my opinion the words "any stone, gravel, sand or clay" were not introduced for the purpose of conferring upon the tenant any rights other than those which he possessed at the time of the passing of the Act of 1903;

(1) [1910] A.C. 116
(2) [1910] A.C. 83
(3) [1912] A.C. 87
(4) L.R. 7 Ch. App. 699 at p. 712
(5) [1899] 2 Ch. 190 p. 198
(6) [1911] A.C. 290

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rather they were introduced for the purpose of preserving to him such rights in these substances as were his under the law as it then existed.

Mr. MacDermott, for the Ministry of Finance, supported Mr. Porter in the argument that basalt is a mineral and comes within the provisions of section 16, sub-s. (1), of the Irish Land Act, 1925. He also supported Mr. Porter in his argument that the rights in this case possess a substantial value, whether actual or potential, within the meaning of section 16, sub-s. (2). From the evidence given in the case, I am convinced that they have such a value, and so decide. The point remains as to whether there is a reasonable prospect of the mines or minerals to which these rights relate being worked or developed within twenty years, and on this point there is a divergence, though not a very marked one, between the view of Mr. Porter and that of Mr. MacDermott. I have come to the conclusion, after hearing the evidence and explanations given on behalf of the owners, that there is such a reasonable prospect of the working or developing of these minerals within that period—that is twenty years.

Solicitors for the Owners: *Bigger & Strahan.*
Solicitor for the Treasury: *J. H. B. Gunning.*

J. M'C.

K.B.D.
(Bankruptcy)
1929

February 8

IN THE MATTER OF SAMUEL JOHNSTON, A BANKRUPT (1).

Bankruptcy—Partly secured creditor—Security diminished by criminal and fraudulent acts of the bankrupt—Liberty to amend proof of debt by increasing amount—R.S.C. 1905, *Order* 88, *rr.* 87 *and* 100.

J., who was adjudicated bankrupt on 16th September, 1927, was indebted to the U. Bank. Prior to the adjudication the Bank had registered judgment mortgages against two farms belonging to the bankrupt. The Bank estimated the value of such security and proved as unsecured creditors for the balance of their debt. Subsequently as a result of the bankrupt's criminal acts the value of the farms was so depreciated that they failed to realize the amount at which they had been assessed by the Bank. The Official Assignee had recovered sufficient assets to pay all the unsecured creditors twenty shillings in the pound.

Held, that the U. Bank were entitled to amend their proof of debt by increasing the amount thereof.

Motion by the Ulster Bank, Limited, for an order giving them liberty to amend the proof of debt filed by them in the matter.

Samuel Johnston, who was adjudicated bankrupt on 16th September, 1927, was at that date indebted to the Ulster Bank, Limited, in the sum of £3,144 17s 5d. Prior to the adjudication the Bank had registered judgment mortgages against two farms belonging to Johnston and had obtained an order in the Chancery Division declaring the amounts, so secured, well charged on the lands. The Bank assessed the value of this security at £2,700, and proved as unsecured creditors for the balance of their debt. Subsequently, while the farms in question were let for pasture, the bankrupt mutilated cattle grazing on the lands. As a result of this unlawful conduct prospective purchasers were disinclined to buy the farms, and accordingly it was found impossible to dispose of them at the price at which they had been valued by the Bank.

The assets in the hands of the Official Assignee were sufficient to pay all unsecured creditors in full.

(1) In the King's Bench Division (Bankruptcy) before Brown, J.

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The Bank sought liberty to amend their proof of debt by increasing the amount thereof from £444 7s 5d to £700.

McGonigal K.C. for the applicants :—

The Court has jurisdiction under Order 88, r. 100 of R.S.C. 1905, to allow the proof of debt to be amended. Such amendments were allowed in *Ex parte Graecen* (1) and in *In re a Debtor* (2).

Pringle K.C. for the bankrupt :—

The authorities cited do not govern the present case. There is no precedent for allowing a proof to be amended at this stage. It is specifically provided by Order 88, r. 87 of R.S.C. 1905, that no proof shall be increased in the event of the security realizing a less sum than the value at which the creditor has assessed it.

Warnock for the Official Assignee.

BROWN, J. :—This is an application for which, I am told, there is no precedent. The Ulster Bank, Limited, are seeking at a very late stage to amend the proof of debt filed by them in the matter, by increasing the amount of their proof as unsecured creditors from £447 15s 5d to £700. I have been referred to Rule 86 of the Rules of the Supreme Court, 1905, which provides that a secured creditor shall state in his proof the value of his security, and shall be deemed to be a creditor only in respect of the balance. I was also referred to Rule 87, which prohibits any increase in the proof in the event of the security realizing less than the value at which it was assessed. These rules are obviously necessary to prevent a creditor amending his proof at a late stage. But Mr. McGonigal submits that I have jurisdiction under Rule 100, which allows any amendments which in the judgment of the Court ought to be allowed, and he submits that this rule is applicable to the present case. It seems to me that there is nothing in the Statutes to prevent amendment, and that Rule 100 gives a wide discretion to the Court.

I do not think that either *In re a Debtor* (2) or *Ex parte Graecen* (1), which were cited, governs this application.

(1) 31 I.L.T.R. 56 (2) 45 I.L.T.R. 20

Since the valuation the bankrupt has deliberately done certain criminal acts with intent to defraud his secured creditor, and the result has been that he has depreciated the value of the security. There is sufficient money in Court to pay all the unsecured creditors, including the Ulster Bank, Limited, even with its amended proof, twenty shillings in the pound. Consequently, if I were to bind the Bank by their valuation the result would be that the bankrupt, and he alone, would benefit by his own criminal and fraudulent acts. I am of opinion that Rule 100 gives me ample power to prevent such a fraud, and accordingly I allow the proof to be amended. The only person who suffers is the bankrupt.

As a matter of principle is involved, I allow all parties their costs out of the estate.

Solicitor for the applicants: *William A. F. Martin.*

Solicitors for the bankrupt: *S. Ross & Co.*

Solicitors for the Official Assignee: *Wheeler & McCutcheon.*

J. D. C.

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February, 15, 22

ESTATE OF EGERTON (1). (N.I. 524.)

Land purchase—Allocation of purchase money—Deduction in respect of works maintained by landlord—Redemption of head rent—Priority of claims—Northern Ireland Land Act, 1925 (13 & 14 *Geo.* 5, *c.* 34), *s.* 27.

The estate of E. vested in the Land Purchase Commission under the provisions of the Northern Ireland Land Act, 1925. On the allocation of the purchase money the Treasury claimed to be entitled to a deduction, pursuant to section 27, in respect of half the cost of the maintenance and repair of certain works on the lands. The funds in court were insufficient to redeem an annual rent payable out of the estate, and accordingly the I. Society, who were the owners of this rent, objected to the Treasury's claim and alternatively to its appearing on the final schedule of incumbrances in priority to their claim in respect of the redemption price of their rent.

Held, that the Treasury were entitled to the deduction under section 27 of the Northern Ireland Land Act, 1925, and that this claim took priority to the redemption price of the head rent.

Objection to Final Schedule by the Honourable the Irish Society. The estate of Hugh Sydney Egerton vested in the Land Purchase Commission under the Northern Ireland Land Act, 1925. The third item on the final schedule of incumbrances was a claim by the Treasury to a deduction from the purchase money, pursuant to the provisions of section 27 of the same Act, in respect of half the cost of the repair to the sea embankments bounding the holding, and engine and pumps necessary to clear the drains of water. The next item on the schedule was a claim by the Irish Society in respect of an annual rent of £77 15s 6d, payable out of the lands. The funds in court were insufficient to redeem this rent, and accordingly the Irish Society disputed the Treasury's claim, and objected to the priority given to it on the final schedule.

A fair rent order, dated 14th June, 1902, which was put in evidence, shewed that the fair rent of £70, payable to the vendor in respect of the holding comprising the estate, was fixed on the basis that he was to afford the tenant all reasonable assistance in maintaining the sea banks of the holding.

(1) In the Court of the Land Purchase Commission before Megaw, K.C., Judicial Commissioner.

Monroe K.C. for the vendor.

Murphy K.C. and *Chambers* for the Irish Society :—

The Irish Society are under no liability to do any of the work in respect of which the deduction is claimed, and accordingly their right to have their rent redeemed should not be prejudiced.

Even if the Treasury's claim is sustainable, it should not take priority to our claim. It would require the clearest provisions in an Act of Parliament to enable the Treasury to succeed in a claim, the effect of which would be to deprive the Irish Society of their rent without compensation. Such a result would be contrary to the policy of the Land Acts.

Davison K.C. for the Treasury :—

The object of section 27 of the Northern Ireland Land Act, 1925, is to secure the continuation of the protection of the lands when they come into the hands of the occupying tenants. In the present case the rent which the tenant paid was fixed by the fair rent order on the basis that the tenant got the benefit of the works. Such works were maintained by the landlord for the preservation of the lands and for the benefit of all persons interested in them, and accordingly the expenditure so incurred should be a first charge on the purchase money. The word "deduction" would not have been used in section 27 if it had been intended that claims under this section were to rank with other charges.

Cur. adv. vult.

THE JUDICIAL COMMISSIONER : The question as to priorities in allocation of the purchase money depends really on the construction of section 27 of the Northern Ireland Land Act, 1925, and I am not sure that I can get much assistance from any previous decisions.

It is well settled, however, that the purchase money represents the purchase price of the fee simple discharged from all outstanding estates or superior interests, except such matters as are specially reserved by the Land Code—and these are chiefly rights relating to mines. In the

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present case the tenant, through the Land Purchase Commission must acquire the fee when he gets the vesting order which he is entitled to under section 12 of the Act of 1925, and he will have for the future no rights or advantages in connection with the holding which he may have enjoyed at the expense of the landlord while he was still tenant.

In my opinion section 27 was enacted to meet such a case, to give the tenant an equivalent for the advantages he might have had prior to the vesting in the Commission, and machinery is established for that purpose.

If I were to put the interpretation on the Act so strenuously and ably put before me by Mr. Murphy, I should be negativing the whole purpose of the section.

Let me read the section :—

> 27.—(1) Where it appears to the Commission that any watercourse, drain, embankment, road or other work has, prior to the sale of a holding, been cleansed or maintained in whole or in part by the landlord or at his expense for the benefit of the holding, either alone or in conjunction with other lands, and whether under the terms of the contract of tenancy or otherwise, the Judicial Commissioner may direct that there shall be deducted from the purchase money, and transferred and applied in manner hereinafter provided, a sum, whether in money, stock or bonds, which, in his opinion, will yield an income equivalent to the average annual expenditure incurred by the landlord in such cleansing or maintenance during the period of ten years preceding the date of the passing of this Act, as estimated by the Judicial Commissioner.

I take it that this is a case where "may" means "shall." I do not see how—if I wished—I could escape from these plain words, it does appear to me that "an embankment or other work has prior to the sale of the holding been . . . maintained in whole or in part by the landlord or at his expense for the benefit of the holding."

The pink schedule put in evidence, and the wording in the order fixing the fair rent are vague, but it seems clear enough that the fair rent was actually fixed on the basis of the landlord either in whole or in part maintaining the

sea embankment—whether he was actually liable to do so or not, he has at least contributed to the maintenance of the embankment. In my opinion, therefore, section 27 is applicable. This seems also, so far as the tenant is concerned, to meet the justice of the case—he had to pay a greater rent because of this obligation on part of the landlord. Under the Act of 1925 this results in an increase of the purchase money payable by the tenant over and above what he would have had to pay, had he been under the sole obligation of maintaining the sea embankment.

The consequence of this is that I shall direct a deduction from the purchase money under the Act to be applied in the manner provided for by section 27.

I cannot, however, accept the figures now before the Court as representing the average annual expenditure in maintenance. As at present advised—though, of course, I am not deciding the point—it seems to me that the distinction between capital expenditure for restoration of damage occurring by what may fall under the category "Act of God" and maintenance is very real, and if my decision as to liability holds good I must have further evidence in regard to the amount of the deduction to be made from the purchase money in respect of maintenance. The sum fixed will be payable in priority to the redemption price of the rent payable by the owner to the Irish Society. There is no evidence of any expenditure for the benefit of the holding under any head mentioned in section 27, except embankment.

Solicitors for the vendor: *S. S. & E. Reeves & Sons.*
Solicitor for the Irish Society: *W. A. Lane.*
Solicitor for the Treasury: *J. H. B. Gunning.*

J. D. C.

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1929

May 9

THE MINISTRY OF LABOUR FOR NORTHERN IRELAND v. ANTHONY COWDY & SONS, LIMITED (1).

Factory—Fencing of machinery—Necessity for—Want of reasonable care on part of workman—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 10 (1) (c).

The defendants were the occupiers of a factory. A workman in their employment, following his daily duties, climbed up a ladder to the shafting in the dye-house to fix a belt on a pulley, and was caught in the shafting, whirled round, and killed. No one actually saw the occurrence, but as portions of deceased's clothing were on the shaft they probably got caught in it. An information against the defendants charged that, contrary to the Factory and Workshop Act, 1901, s. 10, sub-s. 1 (c), a part of the mill gearing, namely a line of shafting, was neither securely fenced nor in such a position nor of such construction as to be equally as safe to every person employed or working in the factory as if it had been securely fenced. The justices dismissed the information, but stated a case for the opinion of the King's Bench Division.

Held by the King's Bench Division (Moore L.C.J. and Brown J.) that the defendants in failing to fence the line of shafting had contravened the provisions of section 10, sub-s. 1 (c) of the Factory and Workshop Act, 1901, and should be convicted. *Atkinson* v. *London & North Eastern Railway Company* [1926] 1, K.B., 313, followed.

CASE STATED for the opinion of the High Court of Justice in Northern Ireland, King's Bench Division, by the justices sitting at Charlemont Petty Sessions, held on 6th March, 1929, as follows :—

This is a case stated by the justices sitting at Charlemont Petty Sessions pursuant to the Summary Jurisdiction Act, 1857 (20 & 21 Vic., c. 43), on the application in writing of the Ministry of Labour for Northern Ireland, who are dissatisfied with the determination (hereinafter set forth) as being erroneous in point of law, for the opinion of the King's Bench Division of the High Court of Justice.

At the Charlemont Petty Sessions held on the 6th day of March, 1929, the complainants charged the defendants that on Monday, 11th day of February, 1929, they were occupiers of a certain factory within the meaning of the

(1) In the Divisional Court before Moore, L.C.J. and Brown, J.

Factory and Workshop Act, 1901, at Greenhall Bleach Works, Loughgall, in the Petty Sessions District of Charlemont, and County of Armagh, and that on said date they neglected to observe a certain provision of the Factory and Workshop Act, 1901, contained in section 10 (1) (c), in that a part of the mill gearing, to wit, a line of shafting, was neither securely fenced nor in such a position nor of such construction as to be equally as safe to every person employed or working in the factory, as it would have been if it had been securely fenced, and that in consequence of such neglect one John Richardson was killed.

The facts as proved or admitted were that on 11th February, John Richardson, a workman in the employment of defendant company, at their works at Greenhall, following his daily duties at such works, climbed up a ladder to the shafting in the dye house to fix a belt on a pulley, and when doing so was caught in the shafting, whirled round, and killed. No one actually saw how he got caught, but as deceased's clothing was on the shaft, it probably got caught in the shaft. The line of shafting was 13 feet from the floor, and capable of running 165 revolutions per minute. It was not fenced, and complainants contended that it should have been, or else a loose pulley should have been put on the shaft from which the belt could have been thrown on the fast pulley by a handle worked from the floor.

For the defendants it was contended and given in evidence that both such guards were impracticable.

There was no prosecution of defendants' company until the fatality to John Richardson occurred. It was proved that deceased had performed the same duty for six years with no mishap whatever. It was also proved that at the moment of the accident the engine was slowed down to its slowest limit of 28 revolutions per minute, and in the opinion of the Inspector of Factories an accident would not in such circumstances normally occur.

The justices held as a conclusion of fact on the evidence that deceased met his death through some neglect or carelessness on his own part, and if he had taken reasonable care nothing would have happened to him. Consequently, the justices felt unable to convict the defendant company

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of the charge put forward (see section 136 of the Act quoted above) and dismissed the charge on the merits, and the opinion of the court is sought as to whether the magistrates were entitled to do so.

Murphy K.C. and *Dougherty* for the Ministry of Labour:—The facts in *Atkinson* v. *London & North Eastern Railway Company* (1) are very similar to those existing in the present case. That was an even stronger case than the present. There is an absolute duty on factory owners to fence machinery (in the present case mill gearing). All moving machinery is dangerous, but shafting is not a source of danger, if provided with a loose pulley. We rely on the judgment of Lord Hewart C.J. in *Atkinson* v. *London & North Eastern Railway Company* (1). At page 316, Lord Hewart said, "The justices, before they can dismiss the information in such a case as this, have to find that the gearing complained of is equally safe to every person employed, or working in the factory, as it would be if it were securely fenced."

There was no appearance for the defendants.

MOORE L.C.J. delivered the judgment of the Court:—It seems clear that the justices were not correct in point of law in dismissing the information. The case ought to go back to the justices with a direction to convict.

Solicitor for the Ministry of Labour: *Chief Crown Solicitor.*

J. McC.

(1) [1926] 1 K.B. 313.

NELSON v. PRUDENTIAL ASSURANCE COMPANY, LIMITED AND NELSON.

K.B.D. 1929

March 16
April 15

Policy of insurance—Donatio mortis causâ—Delivery.

J. N. took out a policy of life insurance on her own life, with the defendant company on 1st March, 1926, payable on the expiration of 15 years or on her death, whichever event should first happen. The plaintiff is the wife of the defendant T. J. N., and the mother of J. N. Evidence was given by the plaintiff which tended to show an intention on the part of J. N. that her mother should be the beneficiary of the policy. About the end of January, 1928, she told her mother that she had intended to bring her policy to her and leave it for her, and she added that she took it out for her. She afterwards said that she would leave the policy with a niece of her mother's, and that her mother could get it from her. Her mother was, however, shortly afterwards compelled to go to the infirmary, and never received the policy. Evidence was given by two other witnesses corroborating the mother's testimony. J. N. went into the sanatorium on 27th February, 1928. On the previous day, according to the evidence of one of the witnesses for the plaintiff, J. N. gave her her handbag, which contained her insurance book and policy. There was also money amounting to over £5 in the handbag, and J. N. told her to use it to pay some bills of her's (J. N.'s) and the insurance premiums. J. N. told this witness that what she gave her was for her mother, and the witness said she would give them to the mother. Owing to the plaintiff being in the infirmary, the witness kept them under lock and key in her own box. She kept the money to pay the insurance premiums and anything else J. N. might want. She also paid the bills, and ultimately gave the receipts to the plaintiff. J. N. died on 18th May, 1928. The County Court Judge of Armagh decided that the gift to the plaintiff of the policy of life insurance constituted a valid donatio mortis causâ.

On appeal to the Armagh County Assizes it was

Held, by Andrews L.J., that all the essential conditions of a valid and effectual donatio mortis causâ had been established, that the decision of the County Court Judge was right, and that the appeal must be dismissed with costs.

APPEAL to the Armagh County Assizes from an Order of the County Court Judge of Armagh declaring that a gift by Jane Nelson, deceased, to the plaintiff of a policy of life insurance of the deceased on her own life constituted a valid donatio mortis causâ.

The facts are fully set out in the judgment of Andrews L.J.

McGonigal K.C. and *Sheil* for the plaintiff.

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NELSON v. PRUDENTIAL ASSURANCE COMPANY LIMITED, AND NELSON

Murphy K.C. and *Maginess* for the defendant Thomas J. Nelson.

There was no appearance for the Prudential Assurance Company, Limited.

Andrews L.J. reserved his decision, and later delivered a considered judgment in Belfast.

ANDREWS L.J.: This case came before me at the last assizes for the County of Armagh on an appeal by the defendant, Thomas J. Nelson, from an order of the learned county court judge, which declared that an alleged gift by one Jane Nelson, deceased, to the plaintiff of a policy of life insurance of the deceased on her own life constituted a valid donatio mortis causâ.

The deceased, who was a wardress in the Armagh Gaol, took out the policy with the defendant company on 1st March, 1926, payable on the expiration of fifteen years or on her death, whichever event should first happen. The premium was six shillings per month, and the amount due on the policy is admittedly fifty-one pounds twelve shillings. The plaintiff is the wife of the defendant, Thomas J. Nelson, and the mother of the deceased Jane Nelson.

Evidence was given before me by the plaintiff, who is an attendant at the asylum in Armagh, and who favourably impressed me as an honest witness, that at the time when the policy was taken out a discussion arose as to whether the premium was not too high, the deceased said, "It is no matter, mother, I am doing it for you, hoping it will benefit you another day." This, if true, as I believe it to be, is of some importance, as evidencing an intention on the deceased's part from the beginning that her mother should be the beneficiary of the policy.

About the end of January, 1928, the deceased came to her mother twice in one week when she was evidently suffering from at least a bad cold. She said to her mother that she had intended to bring down her policy and leave it for her, adding that she took it out for her. When going away she said if she would leave it with her mother's niece—Mrs. Lily Duncan—her mother could get

it her next time out. The mother was, however, compelled shortly afterwards to go to the infirmary, where she had to undergo two serious operations.

Mrs. Duncan never received the policy, which was in fact handed by the deceased to a Miss Ross, a fellow wardress in the Armagh Gaol, in circumstances which I shall refer to later; but Mrs. Duncan's evidence is not unimportant. She tells us that the deceased was ill from Christmas, 1927, at which time she was actually in bed. A fortnight before her death the deceased asked Mrs. Duncan if the policy had been left by Miss Ross with her for her mother, as she knew her mother would be going to her, Mrs. Duncan, about it, when she came out of the infirmary. This evidence of an apparently independent witness is clearly corroborative of the mother's testimony.

The only remaining witness for the plaintiff was Miss Ross, who, after deposing to the deceased's bad health from Christmas, 1927, tells that the deceased went into the sanatorium on Monday, 27th February. On the previous day she asked Miss Ross to come over to her room, as she wanted her, and she then gave Miss Ross her handbag, which contained her insurance book and policy. She told Miss Ross to pay her insurance premiums every month. Miss Ross observed there was money also in the bag, and asked her how much, to which she replied that she did not know. Miss Ross counted it, and found it amounted to over £5. Miss Nelson said that that would do to go on with—to pay some bills of hers and the insurance premiums. The bills were for things which her mother, the plaintiff, had got for her, and which had not been paid for. Miss Nelson told Miss Ross that what she gave her was for her mother, the plaintiff, and Miss Ross said she would give them to her. Owing to the mother being in the infirmary Miss Ross kept them under lock and key in her own box. She says she kept the money to pay the insurance premiums, and anything else Miss Nelson might want. She also paid the bills, and ultimately gave the receipts to the mother, but she could not clearly remember if the bills were in the mother's or in the daughter's name. The deceased died of pulmonary tuberculosis on the 18th May, 1928, less than three months after the alleged gift.

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I do not propose to go into the evidence given for the defence; for, as I intimated at the hearing, where any conflict of testimony arises between the plaintiff's and defendant's witnesses, I accept the evidence of the plaintiff's witnesses as the more reliable. The sole question for me to determine is whether the circumstances detailed by these witnesses are such as to constitute a valid donatio mortis causâ of the policy by the deceased to her mother, the plaintiff.

It is not denied that a policy of life insurance is, like a bond or mortgage, capable of being made the subject of a donatio mortis causâ; and money due on it will pass as such by delivery of the policy. This was established many years ago in *Amis* v. *Witt* (1), and has never since been successfully questioned. Its authority was expressly recognised by the Irish Court of Appeal in *Duckworth* v. Lee (2).

It has long been settled that three conditions must co-exist for the establishment of a valid donatio mortis causâ:—

(a) The gift must be made in contemplation of death;
(b) there must be a delivery of the subject of the gift;
(c) it must be made in circumstances which show that it was only intended to be operative in the event of the death of the donor from his then existing disorder.

Mr. Murphy, for the defendant Nelson, submits that the evidence in the present case fails to satisfy any of these conditions. I shall briefly consider each of them in the light of accepted authority.

As to the first, it has frequently been held that the necessity for the gift being made in contemplation of death does not necessarily involve that it was made in actual expectation of death. It is enough if the gift is made, as it has been expressed, "in peril of death," i.e., in contemplation of the conceived approach of death; and this has been presumed where the donor is in his last sickness, or languishing in his death-bed. Each case must depend on its own special facts; but I am clearly of opinion that in the present case, in which the gift was made after the deceased had been ill for some months, and on the eve

(1) 1 B. & S. 109, 33 Beav. 619. (2) [1899] 1 I.R. 405 at p. 407.

of her entering a sanatorium suffering from a disease which is universally recognised as one of the greatest scourges of civilised humanity, and in what actually proved to be her last and fatal illness, it is not only permissible for me, but it is really my duty, to presume that it was made in contemplation of death. This presumption cannot be rebutted by the mere circumstance that the disease proved in her case to be a somewhat lingering one, and that death did not supervene till almost three months later.

The second requirement—delivery—can only be satisfied by an act of gift as distinguished from mere words, and the delivery must be absolute in the sense that the donor parts not merely with possession but also with complete dominion over the subject of the gift to the donee. At the same time it is recognised that the delivery need not necessarily be to the donee himself. It is sufficient if it is made to some one else for the donee's use. The third person, however, to whom delivery is so made must be agent for the donee; delivery to an agent, in the character of agent for the giver, is not sufficient. It has further been held that, though the delivery must be absolute, the gift may be coupled with a trust, as, for instance, to provide for the funeral expenses of the donor. It has been argued in the present case that Miss Ross must be held to have been the agent of the deceased, and not the agent of the plaintiff, as she was instructed by the deceased to pay the premiums on the policy to keep it alive, and also to pay the small accounts referred to. It seems to me that some confusion of thought enters into this argument. All the payments were to be made, not with the policy or its proceeds, but with the five pounds odd which was handed by the deceased to Miss Ross for this express purpose; and no part of this sum has ever been claimed to have been the subject of a donatio mortis causâ. Is it to be said that the gift of a horse could not be in law a valid donatio mortis causâ, merely because when made to a third person, as agent for the donee, the donor gave at the same time some fodder, or money with which to buy fodder, to the agent to keep it from starvation until it was handed over? I am of opinion that as regards the policy, Miss Ross was agent for the plaintiff,

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the donee; and that this operated as a complete ante mortem delivery by the deceased to her mother, to whom, as she told Miss Ross, she was only prevented from making a personal delivery by her mother's illness in, and confinement to the infirmary.

This brings me to the last condition, namely, that the circumstances must show that the gift was only intended to take complete effect in the event of the donor's death. It must be admitted that no words were used by the deceased either to her mother, to Miss Ross, or to Mrs. Duncan, which so limited the gift in express terms; but it has long been settled that it is unnecessary for the donor to declare expressly that the gift is to be returned to him if he recover; for, if made in contemplation of death, the law implies a condition that it is to be held only by the donee in the event of the donor's death. See judgment of Sir John Leach, V.C., in *Gardner* v. *Parker* (1); also *Tate* v. *Leithead* (2) and *In re Beaumont*, *Beaumont* v. *Ewbank* (3). It seems to me to be particularly easy to make this presumption when the subject matter of the gift is a policy of life insurance.

I, accordingly, hold that all the essential conditions of a valid and effectual donatio mortis causâ have been established, either by unimpeachable evidence or by legitimate inferences and presumptions, to co-exist in the present case; that the decision of the learned county court judge was right, and that the appeal must be dismissed with costs. The five pounds lodged in court by the appellant will be paid to the plaintiff on account of such costs.

Solicitors for the plaintiff: *Monroe & Anderson.*
Solicitors for the defendant: *Best & Gillespie.*

J. McC.

(1) 3 Madd. 184. (2) Kay 658 and 662.
(3) [1902] 1 Ch. 889 at p. 893.

SWEENEY v. LISNASKEA RURAL DISTRICT COUNCIL (1).

C.A. 1929

May 6
May 9

Public health—Public Health (Ireland) Act, 1878 (41 & 42 *Vic.*, *c.* 52), *s.* 2; *Public Health Acts Amendment Act*, 1890 (53 & 54 *Vic.*, *c.* 59), *s.* 19—"*Single private drain or sewer.*"

The plaintiff brought a civil bill for damages sustained by her by reason of the negligence of the defendants in failing to keep in a proper state certain drains and sewers situate at the rear of her premises and vested in the defendants. The county court judge held in plaintiff's favour and assessed the damages at a sum of two pounds. The defendants appealed to the judge of assize. The alleged sewer runs at the rere of a number of houses, and there is a gully in each of the yards at the back of each house into which surface water thrown from the house finds its way and thence passes into the alleged sewer. Part of this sewer became choked with matter in 1928. As the defendants did not clean it out, the plaintiff employed a contractor to do this work. This contractor, giving evidence on behalf of the plaintiff, stated that some years ago he was employed by the then sanitary authority, the predecessors of the defendants, to put a gully trap in the yard of one of these houses.

The judge of assize stated a case for the opinion of the Court of Appeal.

Held, by the Court of Appeal (Moore, L.C.J. and Best, L.J.) that the alleged "sewer" is not a "sewer" vested in the sanitary authority under section 2 of the Public Health (Ireland) Act, 1878 (41 & 42 Vic., c. 52), but is a "single private drain" under section 19 of the Public Health Acts Amendment Act, 1890 (53 & 54 Vic., c. 59).

CASE STATED on the hearing of a civil bill appeal for the opinion of His Majesty's Court of Appeal in Northern Ireland by Andrews L.J. at the County of Fermanagh Spring Assizes, 1929, as follows:—

The plaintiff in this civil bill sought five pounds damages alleged to have been sustained by her by reason of the negligence of the defendants, their servants or agents, in failing to keep in a proper state certain drains and sewers situate at the rere of the plaintiff's premises at Crom Road, Newtownbutler, and vested in the defendants, and which, as the plaintiff alleged, they were bound to keep in proper condition. The learned county court judge held in the plaintiff's favour, assessing the damages at the sum of two pounds, for which sum he gave a decree with costs and witnesses' expenses. From this decree the defendants appealed.

(1) In the Court of Appeal before Moore, L.C.J. and Best, L.J.

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The evidence given before me was very short. I refer to the map made by Mr. Jas. Kelly, C.E., the accuracy of which was not successfully challenged. The alleged sewer, coloured green, runs at the rere of the houses from the gully in the yard of the house marked "Clarke" to the house marked "M'Ariney," and there is a gully in each of the yards at the back of each house, into which surface water from the yard or water thrown from the house finds its way, and thence passes into the alleged sewer. A. is where it turns and runs along the gable wall and connects with the sewer running along the front of the premises. The part of the alleged sewer at rere marked "Lifted" became solidly choked with matter in the autumn or early winter 1928. A letter was written by or on behalf of the plaintiff to the defendants complaining of this state of affairs, and requesting that it should be remedied, to which the defendants replied by notice of 19th December, 1928 (following a former similar notice dated 16th April, 1928), calling upon the plaintiff to abate the nuisance and for that purpose to make connections from her dwelling with the main sewer at the front of the premises. As the defendants did not clean out the alleged sewer at the point referred to, the plaintiff employed a contractor, named James Martin, who took up the pipes. This witness also proved that none of the houses in this row had water closets; and that some years ago he was employed by the Clones No. 2 Rural District Council, then the sanitary authority for the town of Newtownbutler and predecessors of the defendants, to put the said gully trap in the yard behind Clarke's house. Whether this gully trap was a new work or merely a replacement of an old trap was not stated. The sewer in the front of the houses was only laid down a few years ago, and no pipe is or has ever been connected with it from any of the houses. The alleged sewer at the back of the houses has no openings into it save the openings from the surface of the yards at the gullies marked on the map. Peter M'Ariney proved that the alleged sewer at the rere was an old one, though, formerly, before his house marked "A" was erected, it used to run practically diagonally across the site now occupied by that house. Its course was changed by M'Ariney, at the time the house was built, to that which now appears in the map.

Mr. Davison K.C., for the defendants, called no evidence, but contended that the alleged sewer which was choked was not a sewer within the Public Health Acts; that it was not vested in the defendants, and that they had no control or responsibility of maintenance in respect thereof. He referred to section 17 of the Public Health (Ireland) Act, 1878, and section 19 of the Public Health Acts Amendment Act, 1890, and submitted that the alleged sewer was a " single private drain " within the latter section. He further contended that if the alleged sewer was a sewer vested in the Council the plaintiff's remedy was not by civil bill, but by proceedings for a writ of mandamus. He stated that the records, if any, of the work alleged to have been done at the gully trap behind Clarke's house were in the Irish Free State in the possession of the Clones Rural District Council, the former sanitary authority for the town, and suggested that any such work may be explained by the exercise by the sanitary authority of their powers of abatement of nuisances.

Mr. Murphy, K.C., for the plaintiff, contended that the alleged sewer was prima facie a sewer vested in the defendants as the local sanitary authority; that the onus of showing that it was a " single private drain " lay on the defendants, and that this onus they had not discharged. He referred to *Seal* v. *Merthyr-Tydfil Urban District Council* (1) (following *Bradford* v. *Eastbourne Corporation* (2)) as set out in Vanston's Public Health Acts (2nd edit., pp. 335-6). He further submitted that the plaintiff's remedy was not confined to mandamus.

I referred to *Holywood Urban District Council* v. *Grainger* (3), as noted in the addenda to Vanston's Public Health Acts, p. xc. I asked for, but could not obtain, any evidence as to the names of former owners of the houses, which it appeared to me might be relevant under section 19 of the Act of 1890. The defendants did not deny that the alleged sewer had been choked; and there was no suggestion that, if the plaintiff was entitled to succeed, the damages awarded by the learned county court judge were excessive. I, accordingly hold that they were reasonable.

(1) [1897] 2 Q.B. 543 (2) [1896] 2 Q.B. 205.
(3) [1913] 2 I.R. 126.

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Both parties agreed that I should state a case for His Majesty's Court of Appeal in Northern Ireland. The questions to be determined by the court are as follows :—

1. Is the alleged sewer a sewer vested in the defendants, for the maintenance of which they are legally responsible? or
2. Is it a single private drain within section 19 of the Act of 1890?
3. Is the plaintiff's remedy, if any, limited to proceedings for a writ of mandamus? or
4 Is she entitled to recover the amount of her loss as damages by civil bill?

Murphy K.C. and *Chambers* for the plaintiff :—*Baron* v. *Portslade Urban District Council* (1) decided that section 299 of the Public Health Act, 1875, in providing for complaint to the Local Government Board where a local authority has made default in the maintenance of existing sewers, does not apply to s. 19 of the Act, which imposes on local authorities the duty to cleanse sewers vested in them, and consequently does not affect the right of action of a person who has sustained damage through the negligence of a local authority in not cleansing a sewer vested in them. In that case the Earl of Halsbury L.C. said in his judgment, "I cannot see either in the section or in the cases cited anything to take away the right of action of a person who has sustained an injury through the neglect of the local authority."

We specially rely on section 21 of the Public Health (Ireland) Act, 1878, which provides that " Every sanitary authority shall cause the sewers belonging to them to be constructed, covered, ventilated and kept so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied." Apart from the Public Health Acts Amendment Act, 1890, this pipe was a sewer for all purposes of the Act of 1875. Assuming that s. 19 of the Act of 1890 applies, this pipe still remains vested in the local authority. Section 19 does not afford any defence to this action, but we submit that section 19 does not apply

(1) [1900] 2 Q.B. 588.

to this particular drain. The defendants have not discharged the onus of proof, it is for them to establish that this is a "single private drain." We rely upon the decision in *Urban District Council of Wood Green* v. *Joseph* (1). We also rely upon the decision in *Pemsel and Wilson* v. *Tucker* (2), which is an authority, showing that plaintiff's remedy under the Act of 1875 still exists. The first question, which is, "Is the alleged sewer a sewer vested in the defendants, for the maintenance of which they are legally responsible?" should be answered "Yes," and the second question, which is, "Is it a 'single private drain' within section 19 of the Act of 1890?" should be answered "No."—Even although the court decides that this is a "single private drain," the plaintiff is still entitled to maintain her action. In *Kingston-Upon-Hull Corporation* v. *North Eastern Railway Company* (3), Bankes L.J. said at p. 38 "One material point, however, stands out in some of the authorities to which we have been referred, namely, that none of the provisions of the Public Health Act, 1875, are repealed by the Public Health Act, 1890; consequently if a nuisance exists, a given line of pipes may for the purpose of section 19 be treated as a single private drain, and yet it none the less remains a sewer vested in the local authority and repairable by them as such."

Davison K.C. and *Sheil* for the defendants:—

We rely upon *Self* v. *Hove Commissioners* (4). In *Bradford* v. *Mayor of Eastbourne* (5) a drain pipe passing through private property and which had, from a date prior to 1890, received the drainage of several houses belonging to different owners before it joined the public sewer, was held to be a "single private drain" within the meaning of section 19 of the Public Health Acts Amendment Act, 1890, and the local authority were entitled to recover. Section 19 throws the obligation of keeping the drain in order upon the occupiers of the houses. *Pemsel and Wilson* v. *Tucker* (2) does not affect the present case. In

(1) [1908] A C, 419.
(2) [1907] 2 Ch. 191.
(3) [1916] 1 Ch. 31.
(4) [1895] 1 Q.B. 685.
(5) [1896] 2 Q.B. 205.

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SWEENEY v. LISNASKEA RURAL DISTRICT COUNCIL

Seal v. *Merthyr Tydfil Urban District Council* (1) a drain pipe passing through private property and receiving the drainage of several houses belonging to different owners before it joined the public road, was held, following *Bradford* v. *Eastbourne Corporation* (2), and disapproving *Hill* v. *Hair* (3), to be a "single private drain" within the meaning of section 19 of the Act of 1890. We rely strongly on *Holywood Urban District Council* v. *Grainger* (4). The shifting of the sewer is inconsistent with the ownership of it by the defendants. This is a "single private drain" within section 19 of the Act of 1890.

[MOORE L.C.J.: We are of opinion that there is no distinction between the present case and *Holywood Urban District Council* v. *Grainger* (4).]

[*Davison K.C.* was stopped.]

Chambers (in reply):—

We submit that the present case is clearly distinguishable from *Holywood Urban District Council* v. *Grainger* (4). There is evidence on behalf of the sanitary authority that certain alterations were made to the sewer. A drain can be both a "single private drain" and a "sewer."

[BEST L.J.: In the form of the questions, Andrews L.J. drew a distinction between a "single private drain" and a sewer.]

If the defendants had carried out their duties the drain would not have been choked. If this is a "sewer" vested in the sanitary authority, the sanitary authority is liable to pay for the cost of keeping it in repair. The Act of 1890 has not repealed the provisions of the Act of 1878. There are two liabilities existing at the same time.

[He also referred to *Reg.* v. *Mayor of Hastings* (5).]

MOORE L.C.J. delivered the judgment of the Court:— We have been discussing for the last two days the question to be decided here. If this was a "sewer" within the definition in section 2 of the Public Health (Ireland) Act, 1878, the Lisnaskea Rural District Council was responsible for the dangerous condition in which it was found. "A sewer" is defined in the

(1) [1897] 2 Q.B. 543.
(2) [1896] 2 Q.B. 205.
(3) [1895] 1 Q.B. 906.
(4) [1913] 2 I.R. 126.
(5) [1897] 1 Q.B. 46.

following terms—"Sewer includes sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies, and except drains vested in or under the control of any authority having the management of roads and not being a sanitary authority under this Act." Damages were given upon the basis that the conduit (I use a negative word deliberately) was "a sewer." The liability with regard to "drains" as defined by the same statute (section 2) is quite different from that with regard to "sewers."

If this is "a drain," the local sanitary authority would not themselves be under any liability, but would have power to compel the owner to put it in proper condition, or to compel her to pay the proper charges for doing so. Under the provisions of section 19 of the Act of 1890 the question we have to decide is, is this "a single private drain" or a "sewer." A "drain" is defined by the Public Health (Ireland) Act, 1878, as meaning "any drain of and used for the drainage of one building only or of premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed."

[His Lordship then read the paragraph in the Case Stated describing the situation of the drain in question.]

We have carefully considered the judgment of the King's Bench Division of the late High Court in *Holywood Urban District Council* v. *Grainger* (1), and we approve of it and, as we regard the facts there as being in pari materia with those in the present case, we cannot distinguish it.

The court made the following order—

"The court doth answer the said questions Nos. 1 and 4 respectively in the negative, question No. 2 in the affirmative, and having regard to these answers, doth not deem it necessary to answer question No. 3, and accordingly doth declare that the said decree should be reversed, and the plaintiff's civil bill dismissed."

We allow the respondents their costs of the Case Stated and argument thereon, which we measure at fifteen guineas.

Solicitor for the plaintiff: *B. Leslie Winslow.*

Solicitors for the defendants: *Maguire & Herbert.*

J. McC.

(1) [1913] 2 I.R. 126.

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Jan. 22
Feb. 19

ESTATE OF CROMMELIN AND ANOTHER (1). (N.I. 778.)

Land purchase—Tenanted land—Residential holding—Object of letting—How determined—Northern Ireland Land Act, 1925 (15 & 16 *Geo.* 5, *c.* 34), *s.* 8.

In the year 1915 W. obtained a lease of C. Castle and lands which had previously been let as demesne lands. When the estate of M. C. vested in the Land Purchase Commission under the provisions of the Northern Ireland Land Act, 1925, the owners objected to the inclusion of W's. holding in the provisional list on the ground that the main object of the letting was for a residence.

The owners contended that, from their point of view, the premises were let to W. in 1915 for a residence. On the other hand W. satisfied the Court that his object in taking the lease was to use the castle and lands as a farm.

Held (by Megaw K.C., Judicial Commissioner), disallowing the objection, that it is not the character or description of the holding but the main object of the letting which must guide the Court, and that the object which the tenant had in view, when taking the premises is a very important factor.

Moonan v. Conyngham [1895] 2 I.R. 1, applied.

OBJECTION to provisional list by Maria H. de la C. Crommelin and Evelyn A. de la C. Crommelin by reason of the inclusion therein of the holding of Major William E. H. Workman, known as Carrowdore Castle, in the townland of Ballyrawer, County Down.

The grounds upon which the objection was based were that the main object of the letting was for a residence, and that the holding was not substantially agricultural or pastoral, or partly agricultural or partly pastoral in character. The lands in question were held by Major William Elliot Hill Workman under a lease dated 20th day of May, 1915, for the term of twenty years at the rent of £150 per annum, and were therein described as " All that mansion house known as Carrowdore Castle with the out offices farm yard gardens conservatory and pleasure grounds thereto belonging and together with the demesne lands held with the said mansion house . . . "

(1) In the Court of the Land Purchase Commission, before Megaw, K.C., Judicial Commissioner, and Macoun, Land Purchase Commissioner.

The evidence tendered on behalf of the owners was to the effect that, from their point of view, the letting to Major Workman in 1915 was made on the basis that it was a letting of a house and demesne for the purpose of a residence. As against this, Major Workman gave evidence to the effect that he took the property with the object of working it as a farm.

Murphy K.C. and *Chambers* for the owners.

McGonigal K.C. for the tenant.

THE JUDICIAL COMMISSIONER: This case came before the Court on an objection by the owners to the provisional list by reason of the inclusion therein of holding Reg. No. 68, townland of Ballyrawer, in the barony of Lower Ards, Co. Down, containing 137a. 0r. 37p., the reason for the objection being that:—"The main object of the letting was for a residence. The holding is not substantially agricultural or pastoral, or partly agricultural or partly pastoral in character."

The lands are held under a lease dated the 20th May, 1915, made between Miss Maria Henrietta de la Cherois Crommelin and others of the one part and William Elliot Hill Workman of the other part.

[The Commissioner then read the description of the premises let by the lease and the special covenants affecting them.]

We have heard in evidence a very full description of the house and grounds constituting the holding, and Commissioner Macoun and I visited the holding not altogether for the purpose of seeing the lands as they are to-day, but as far as possible to enable us to form an opinion on what the state of affairs was in 1915—the crucial date.

Though the question to be determined is a question of fact, and Commissioner Macoun and I agree in our decision, in view of the importance attached to the case and the arguments presented at the hearing I have thought it right to state in my judgment the reasons which influenced me with some detail.

The history of the lands for the last hundred years is in evidence. While the Crommelin family owned the

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lands, which they did till 1904, they were demesne lands. In 1904 they were let to Capt. Somerset Ward for a 7 years' term for £200, a letting which I have no doubt was the letting of a demesne. Then on the fall of the lease in 1911 there was a new agreement by which the house with the ornamental part of the lands, containing 55 acres, were again let to Capt. Somerset Ward at a rent of £119, while the remainder of the lands were let in conacre. This I should think was probably a letting, the main object of which was for a residence. The amount of land in that letting which could be used for tillage or pasturage was a small proportion of the whole. Apparently Capt. Somerset Ward was one of the landed gentry who had private means of something like £1,000 a year, but all the same I can hardly think that during his tenancy the decay in the building—which is so evident now—had not begun.

Capt. Somerset Ward died soon after this letting, and his executors surrendered the tenancy, and for some time prior to the lease to Major Workman the lands and house were in the landlords' hands.

The house and grounds are well described in Mr. Swiney's evidence—though I should be disposed to think that his estimates for making the house comfortably habitable would be found too low. The neglect that he speaks of as regards the pleasure grounds and walks is not a matter of yesterday. From our observations we should conclude that the decay and neglect had set in before the present tenant took over. Mr. Swiney describes the whole premises as a gentleman's residence with a small demesne attached. That certainly was once the case in its fullest sense, and to-day they might be so described with the qualification that they had seen better days. Mr. Swiney very emphatically repudiates the tenancy being described as an agricultural holding. It is certainly not of the same character as most agricultural holdings. The house is not of the normal type of farm house, and a very considerable part of the lands have no ordinary agricultural utility. Indeed, one is forced to the conclusion that the upkeep of the house and the grounds referred to in the lease of 1915 as " pleasure grounds " would be a serious incubus on the value of the

lands in the hands of a farmer though the outbuildings were, once on a time, well suited for a large farm well stocked and fully cultivated.

The question at issue, however, does not by any means solely depend on the present or past character of the holding, though this is an element that requires most careful consideration in determining the point that we have got to decide, viz., the intention of the parties to the contract as regards the letting—section 8 sub-s. 3 (b) of the Act of 1925 excludes from its operation a tenancy :—

> "the main object of the letting of which was for a "residence."

If we find that a gentleman's residence with a small demesne attached had not been let in circumstances the main object of which was for a residence—the lands cannot be excluded from the provisions of the Act of 1925. In short it is not the character or description of the holding, but the main object of the letting which must govern our decision.

The evidence as to the negotiations for the letting in this case is very meagre. Apparently there was a long correspondence, but only three out of all the many letters were put in evidence, and these do not throw much light on the matter.

Col. Wallace did not know very much about Major Workman. Apparently he knew his family connections, and was glad to secure a respectable tenant. He did not know nor did he inquire as to Major Workman's purpose in taking the lands. I formed the opinion that he considered Major Workman was a man of considerable wealth who was desirous of securing a somewhat pretentious establishment, and he certainly did not regard him as an ordinary farmer who would be largely dependent on farming for a living. He was anxious to let the property which had been in hands for two years and was in danger of the deterioration often incident to conacre lettings.

Naturally Col. Wallace did not trouble himself much as to Major Workman's purposes. As the law stood at the time, the proposed letting would only be a temporary affair, and the provisions of the Land Law Acts held out no prospects of such a state of things as has now arisen.

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I should gather from the terms of the lease and circumstances in which it was made that Col. Wallace relied on the exclusion of home farms and demesne lands from the purview of the Land Law Acts, and, so far as he was concerned, he made the whole letting on the basis that it was a letting of demesne lands and a letting made for temporary convenience—another ground for excluding tenancies from the provisions of the Land Acts. Undoubtedly at one period of their history the lands were demesne lands, they are in the lease described as the home farm, and I feel pretty certain that there was also some reliance placed on the temporary character of the letting.

The Act of 1925 has changed the law to some extent, and though home farm and demesne lands were formerly excluded from the fair rent provisions of the Land Acts they are not excluded as such from the provisions of the Act of 1925. The question now is :—Was the main object of the letting in 1915 for a residence, as there can be no doubt that the holding is at any rate partly agricultural or partly pastoral in its character?

So far as Major Workman is concerned, I believe his evidence when he says that he took the place to work as a farm. This to my mind was the main object of the letting so far as he was concerned, and while I cannot adopt Mr. McGonigal's argument in its entirety that Major Workman's object is the determining factor, it assuredly is a very important factor. No doubt Major Workman wanted a house, but he wanted a house which would be subsidiary to a farm, not a farm subsidiary to a house. The history of his farming attempts prior to taking Carrowdore bears this out. He had engaged in farming—I should think not very successfully. He changed from farm to farm, and some of his residences were certainly not of a very high class character, and when he in 1915 took the Carrowdore premises I should think that they would have been more acceptable had the house been of a more modest description. The rent certainly does not suggest a rent for a castle, and one cannot leave out of account the arrangement in regard to reduction of rent when it was ascertained that the lands did not contain the 149 acres mentioned in the lease. This again is but an

element that seems to me to have some bearing on the views of the parties. Indeed, the coincidence of the acreage and the poundage of the rent cannot be summarily dismissed, especially in view of the figures shown in the valuation lists.

The rating of the premises is certainly worth noticing. In the valuation sheet the premises are described under four headings—

1st :—House, office and lands, area 52a. 0r. 15p., in which the lands are valued at £55 and the buildings at £58—in all £113.

2nd :—Gate lodge, valued at £1.

3rd :—Land, area 81a. 1r. 30p., in which the lands are valued at £89.

4th :—Land, 3a. 1r. 30p., in which the lands are valued at £3 15s 0d.

I infer that the first denomination consists of the premises let to Capt. Somerset Ward at a sum practically equivalent to the valuation of the whole premises let to him under the last letting. The combined valuation of house and lands of this letting was £113 and the rent £119. If, indeed, the letting was composed of the 1st, 2nd and 4th denominations the figures would be almost identical.

When we come to the letting to Major Workman we find that the rent he pays is slightly lower than the valuation of the lands apart from the buildings. Indeed, the rent reserved by the lease was £150, and the total valuation of the lands was £150 17s 0d. When one adverts to the fact that no payment was made by way of fine or for tenant right the rent reserved does not seem a rack rent for the lands alone.

In considering this case I have read the judgments in *Moonan* v. *Conyngham* (1), which was a decision of the Court of Appeal before the Act of 1896, and the question before the Court was whether the lands were agricultural or not. The Acts then in force did not in terms mention holdings let for residential purposes, and the landlord could only rely on the contention that the lands were not agricultural. The Court itself discriminated between lands

(1) [1895] 2 I.R. 1.

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let for agriculture and those let along with a residence to add to the amenities and full enjoyment of the residence, and " residential holdings " became a well recognised phrase in the Land Law before the words first received legislative recognition in section 5 sub-s. 1 (a) of the Act of 1896. It seems to me that the judgments in *Moonan* v. *Conyngham* (1) throw more light on the principles applicable to such a case as the present than any case that has been decided since. Of course, each case must be determined on its own facts, and in applying the relevant facts of the case under review I have tried as far as possible to observe the principles laid down in the cases.

I have already dealt with the letting to Major Workman. No doubt Carrowdore Castle can be described, and properly described as a gentleman's residence, but I find it hard to conceive that Major Workman, with private means of £250, and with a household such as has been described in evidence, would have willingly taken for residential purposes a house of such proportions. We find him, however, taking 90 acres of land more than had been let by the last lease to Capt. Somerset Ward, and his adventures in farming led him to take some adjoining lands also, and use them in conjunction with the lands let under the lease.

On the whole it seems to me that the lands are tenanted lands within the meaning of the Act of 1925, and that they are not excluded under section 8.

In coming to this conclusion I have given full consideration to the terms of the lease after comparing it with the lease made to Capt. Somerset Ward. Mr. Murphy relied strongly on the description of the lands in the lease and its clauses. The mansion house is put in the forefront and the word demesne appears later. The lease was drawn by the owners' solicitors, and the tenant did not take advantage of any independent legal advice. As I have said, I have formed the opinion that the lease was so drawn, and properly so drawn, that on the face of the document the lands, apart altogether from being the subject of a future tenancy, would have been excluded as demesne lands from the operation of the Land Law Acts, and I do not think its terms bind me to hold that the main

(1) [1895] 2 I.R. 1.

object of the letting was for a residence. The reference in the letter given in evidence only shows the desire of the prospective tenant, who then had only a makeshift residence, to have his family accommodated in the new premises as soon as possible, and we are satisfied that at no stage of the tenancy was Carrowdore Castle used in any other way than might be expected in the case of the dwelling house of a farmer who had a farm of 150 acres. Major Workman has sworn distinctly that he took the place as a farm. For a time he attempted as full a cultivation of it as an ordinary farmer could well have done. He took lettings of adjoining lands for cultivation. He used the buildings attached to the house as farm buildings, and he did some dealing in hunters and attempted cattle and pig rearing, with, I fear, very indifferent success.

Having given the best consideration I can to the case, it seems to me that while at the date of the lease neither party contemplated such a state of circumstances as has arisen under the new Land Act, the main object of the letting was not for a residence. Whatever one may think of the merits of the case it is clearly our duty to carry out the provisions of the Act, and I do not think that I can express the views I have formed as to the letting in 1915 better than by adopting the phraseology of FitzGibbon L.J. in *Moonan* v. *Conyngham* (1), where he said

> "I conclude, therefore, that in this case the object of the landlord was to let his land and the first object of the tenant was to work that land for profit though he also wished to have a good house for himself."

My colleague agrees in the conclusion that the lands fall within the description "tenanted lands," and that the objection to their inclusion in the provisional list cannot be sustained. The decision of the Court accordingly is that the application shall be dismissed with costs.

The owners appealed to the Court of Appeal, but prior to the hearing the appeal was compromised.

Solicitors for the owners: *H. Wallace & Co.*
Solicitors for the tenant: *William Graham & Sons.*

J. D. C.

(1) [1895] 2 I.R. 1 at p. 13.

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May 6

[IN THE COURT OF APPEAL.]

MAGEE v. STOREY (1).

Civil Bill proceedings commenced before the issue of Petty Sessions Summons for assault—Appeal from decree of the Recorder—Conviction and subsequent payment of the penalty after the hearing before the Recorder—Offences against the Person Act, 1861 (24 & 25 *Vic.*, *c.* 100), *s.* 45.

The plaintiff sued the defendant by civil bill for £20 damages for assault. The Recorder held in the plaintiff's favour, and gave a decree for £14 5s. 0d. The defendant appealed from the decree, and entered into a recognizance as provided by section 6 of 45 & 46 Vic., c. 29.

After the case had been at hearing before the Judge of Assize for a short time the defendant admitted the assault and the reasonableness of the damages awarded, and raised a new defence which had not been available to him in the County Court. The defendant relied upon the provisions of section 45 of the Offences against the Person Act, 1861 (24 & 25 Vic., c. 100), and it was contended on his behalf that the defendant's conviction coupled with the payment of the penalty operated as a release from all "further or other proceedings," including the re-hearing of the civil bill on appeal.

Held, by the Court of Appeal (Moore L.C.J. and Best L.J.) that the appeal did not constitute "further or other proceedings" within the meaning of section 45 of the Offences against the Person Act, 1861.

Case Stated by Andrews L.J. on the hearing of a civil bill appeal at the Spring Assizes for the County of Londonderry.

The plaintiff in this civil bill sought twenty pounds damages for assault. The learned Recorder held in the plaintiff's favour, assessing the damages at fourteen pounds five shillings, for which sum he gave a decree with costs and witnesses' expenses. From this decree the defendant appealed, and duly entered into a recognizance with sufficient sureties conditioned as provided by section 6 of 45 & 46 Vic., c. 29.

After the case had been at hearing for a short time, during which evidence of a somewhat serious assault had been given, the defendant by his Counsel admitted the assault and the reasonableness of the damages awarded, which were the only matters contested before the learned Recorder, and raised a new defence which had not been available to him in the County Court.

(1) In the Court of Appeal before Moore, L.C.J. and Best, L.J.

The following facts and dates are material:—11th September, 1928; assault committed. 15th September, 1928; civil bill served on the defendant. 17th September, 1928; petty sessions summons for same assault issued at the suit of the plaintiff, as complainant, against the defendant, commanding appearance on 10th October, 1928, 2nd October, 1928; decree of Recorder for fourteen pounds five shillings. 10th October, 1928; conviction of defendant at petty sessions, when he was ordered to pay a penalty of one pound and one pound costs, and in default imprisonment for fourteen days, one third of the penalty to be paid to the complainant. The defendant was further bound over to keep the peace for twelve months, and, in default, imprisonment for a further term of two months. 10th October, 1928; notice of appeal from the decree of the learned Recorder served.

It was admitted that the penalty and costs awarded at petty sessions had been duly paid by the defendant, and that the plaintiff's solicitor had received and accepted on plaintiff's behalf his one third share of the said penalty.

In the circumstances aforesaid Mr. M'Coy, for the defence, relied upon the provisions of section 45 of The Offences against the Person Act, 1861 (24 & 25 Vic., c. 100), and submitted that the defendant's conviction, coupled with the payment of the penalty and costs thereunder, operated as a release from all further or other proceedings for the same cause, including the rehearing of the said civil bill by way of appeal before me.

Mr. MacDermott, for the plaintiff, submitted *contra*. The point was not fully argued, as both parties expressed their desire that I should state a case for His Majesty's Court of Appeal in Northern Ireland.

The question to be determined by the Court are as follows:—

1. Are the civil bill proceedings, which were commenced three days before the issue of the petty sessions summons for assault, "further or other proceedings . . . . for the same cause" within section 45 of 24 & 25 Vict., c. 100?

2. If not, does the appeal from the decree of the learned Recorder constitute such "further or other

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proceedings" within the section? And, if so, what order should be made in regard to the said civil bill or appeal?

3. Is it competent for the defendant to rely upon the provisions of section 45 of 24 & 25 Vict., c. 100, on the hearing of the appeal, having regard to the fact that the conviction and subsequent payment of the penalty thereunder occurred after the hearing before the learned Recorder, and that such defence was, accordingly, not available either at the date of the service of the civil bill, or at the time of the hearing in the County Court?

McCoy for the defendant:—

I rely on section 45 of the Offences against the Person Act, 1861. This section provides that "If any person, against whom any such complaint as in either of the last three preceding sections mentioned shall have been preferred by or on the behalf of the party aggrieved, shall have obtained such certificate, or having been convicted, shall have paid the whole amount adjudged to be paid, or shall have suffered the imprisonment or imprisonment with hard labour awarded, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause."

The notice of appeal did eventuate in a rehearing, and I submit that a rehearing constitutes "further or other proceedings."

[BEST L.J.: Surely the word shall implies futurity.]

McCoy: The words "further or other proceedings" imply proceedings of a two-fold nature. Until the plaintiff in some "proceedings" gets an order the decree cannot be released to be available for execution. If the Judge of Assize had reversed the decree, the form of order would be that the decree be reversed and is reversed with costs. The foundation of the rehearing is the civil bill. The person who is serving the notice of appeal is doing nothing more than requisitioning a rehearing.

[BEST L.J.: If there had been no appeal from the decree of the Recorder, could the defendant have had an answer to the decree?]

McCoy: He could not avail himself of this section, which only releases him from "further or other proceedings." The word "further" does not necessarily import futurity. The "proceedings" might be contemporaneous. I have been able to find no express decision dealing with the point. The words of section 45 are really mandatory. The defendant is entitled to the benefit of the hearing before the Judge of Assize, and the Judge of Assize is not only empowered but required to hear such civil bill under section 4 of 45 & 46 Vic., c. 29, and this re-hearing before the Judge of Assize constitutes at all events "proceedings" other than the proceedings before the justices.

MacDermott for the plaintiff:—

The third of the penalty which was awarded to the defendant at the petty sessions was awarded to him as complainant and not as compensation. The subsequent conviction could not have disturbed the decree of the Recorder. In Halsbury, The Laws of England, volume 27, paragraph 1840, the law is stated thus:—"Trespass to the person is an actionable wrong, and is also punishable criminally either on summary proceedings or by indictment. In the case of summary proceedings for an assault, if the charge is dismissed on the merits and a certificate of such dismissal is given by the justices, or if the defendant is convicted and undergoes the punishment awarded, no subsequent proceedings, civil or criminal, in respect of the assault can be taken by the complainant." I submit that the recognizance entered into by the defendant does not affect the matter. Section 45 of the Offences against the Person Act, 1861, contemplates proceedings brought by some other person than the defendant. In the County Court in Ireland an appeal which is by way of rehearing cannot possibly be regarded as "further or other proceedings." The words "further or other proceedings" should be read together." These words point to the future. I ask the Court to hold that the appeal does not constitute "further or other proceedings." There is a general rule that no new defence is available at assizes. In Carleton's County Court Practice, 2nd edition, the following statement is to be found—"Matter of defence arising after decree cannot

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be relied upon at the hearing of an appeal against the decree: thus where an attorney, sued in the Civil-bill Court, gave notice of set-off of a bill of costs which he had not then furnished, and was therefore precluded from relying on the set-off, and having appealed, afterwards furnished the bill of costs, it was held that he could not avail himself of the set-off on the hearing of the appeal—*Casey* v. *Lynch* (1).'' If the defendant's contention is correct the anomaly would arise that the county court judge's decree could in effect be reversed at petty sessions.

MOORE L.C.J.: The plaintiff alleges that he was assaulted by the defendant, and, as Mr. McCoy in effect relies on a plea in bar based upon a conviction for this assault, it may be taken so far as proceedings at present have gone, that the assault was actually committed. Its date of happening was on September 11th, 1928.

The plaintiff thereupon, as he was of course entitled to do, issued a civil bill process in the County Court, and on October 2nd the learned Recorder of Londonderry found his case established, and awarded fourteen pounds five shillings, with costs, as compensation.

This was a valid judgment, and the plaintiff would have been entitled thereupon to execute it, had not the defendant, within the statutory period of four days from the end of the sessions, served notice of appeal for the next assizes, and entered into recognizances to prosecute it.

In the meantime, probably at the instance of the Crown (though this does not clearly appear), the defendant appeared before the justices in petty sessions on a summons brought by the plaintiff as complainant for the same assault, and was there convicted and fined in the sum of one pound and one pound costs. This occurred on October 10th, eight days later than the decree.

Under the provisions of section 45 of the Offences against the Person Act, 1861 (24 & 25 Vict., c. 100), such a finding by the justices and payment of the sums awarded is a bar to further or other proceedings, civil or criminal, for the same cause. (His Lordship read the section.)

(1) 4 Ir. Jur. N.S. 44.

The appeal to the assizes came on for hearing before Andrews L.J., on 25th March, 1929. The defendant appeared by Mr. McCoy and contended that by virtue of the last mentioned section, he was entitled to have the Recorder's decree of October 2nd reversed, as the appeal itself was subsequent to the findings of the justices on October 10th.

The section is undoubtedly a bar to all further or other proceedings brought against the defendant in respect of the assault, but, in my opinion, if the Judge of Assize affirmed in March, 1929, the decree of October 2nd, 1928, that is not a further or other proceeding subsequent to the conviction, but merely a validation of the existing decree of October 2nd, 1928, which of course was prior to the conviction.

Although the plaintiff is brought into Court to prove his case before the Judge of Assize, where the appeal is heard by way of a full rehearing, this occurs at the instance of the defendant himself, and I can not regard it as a further proceeding by any other person against the defendant.

I therefore hold that the appeal did not constitute "further or other proceedings" within the meaning of section 45.

We answer question No. 1 as admitted by Mr. McCoy, "No." We answer the first part of question No. 2, "No." We answer the second part of question No. 2 by declaring that the order to be made on the civil bill appeal should be to affirm the decree with costs.

We answer question No. 3 as follows:—If in the circumstances of this case, the provisions of the section operated as a statutory bar, we think the defendant was entitled to raise this defence on the appeal, but, as our answer to question No. 2 makes clear, we think no such bar is established. We order that the defendant pay the costs of the case stated, measured at the sum of ten pounds ten shillings.

BEST L.J.: I concur.

Solicitors for the plaintiff: *Tillie, McDermott & Munn.*
Solicitors for the defendant: *M. C. Feeny & Sons.*

J. McC.

K.B.D.
1929

June 4

SIMMS v. BURNS AND OTHERS (1).

(1929. No. 435.)

Judgment entered on foot of a Warrant of Attorney to confess judgment in the High Court of Justice in Ireland—Jurisdiction to enter judgment in the High Court of Justice in Northern Ireland—Government of Ireland Act, 1920 (10 & 11 *Geo.* 5, *c.* 67), *s.* 40.

In December, 1920, the defendants, J. B. and R. B., purchased three small farms at the price of £2,250. To enable them to pay for the farms they got a loan of £1,800 from the plaintiff. The loan was secured by a mortgage of the three farms and also by a joint and several bond with warrant of attorney of the defendants. The bond and warrant of attorney were executed by all the defendants in the presence of an independent solicitor on 26th January, 1921.

Judgment was entered for the plaintiff on 2nd May, 1929, on foot of the warrant of attorney, which was a warrant of attorney to confess judgment in the High Court of Justice in Ireland.

Held, by Moore L.C.J., that there was jurisdiction to enter judgment on foot of the warrant of attorney in the High Court of Justice in Northern Ireland.

Motion by the defendants to set aside a judgment entered for the plaintiff, on the ground that the judgment was entered on foot of a warrant of attorney dated 19th January, 1921, to confess judgment in the High Court of Justice in Ireland, and that there was no jurisdiction to enter judgment in the High Court of Justice in Northern Ireland.

In December, 1920, the defendant, James Burns, at a public auction, purchased three farms situated in the County of Londonderry at the price of £2,250. Two of the farms were conveyed to James Burns and his son, the defendant Robert Burns, as joint tenants and the third farm was conveyed to James Burns alone.

James and Robert Burns, not having sufficient money to complete the sale, obtained from the plaintiff a loan of £1,800. The loan was secured by a mortgage of the three farms and also by a joint and several bond (collateral with the mortgage) of the defendants. The mortgage

(1) In the King's Bench Division before Moore, L.C.J.

deed provided that the repayment of the loan was to be secured by the mortgage and by a joint and several bond. On 26th January, 1921, the defendants executed the bond and warrant of attorney in the presence of an independent solicitor who was acting on their behalf. The warrant of attorney was one to confess judgment "in the High Court of Justice in Ireland."

In December, 1928, the three farms of land were put up for sale by public auction by plaintiff under the power of sale in the mortgage. The premises were sold for £850. After the sale of the lands had been completed it was found that the balance due by the defendants on foot of the bond was £1,184 4s 3d. Demand for payment was made, and the defendants having made no reply, the plaintiff on 2nd May, 1929, marked judgment against all the defendants for the penal sum of £3,600, with interest at six per cent. per annum.

McGonigal K.C. and *Dougherty* for the defendants :—

It is impossible for the plaintiff to enter judgment legally, because the High Court of Justice in Ireland has ceased to exist. This is not a question of jurisdiction but of contract. The defendants can still sue on the bond. The only consent given by the defendants was to have judgment given against them in the High Court of Justice in Ireland. These new Courts do not represent the Courts that existed in Ireland previous to 1921. The Courts that previously existed have ceased to exist. We submit that there is no power to enter judgment in Northern Ireland.

[They referred to the Government of Ireland Act, 1920, sections 38 & 40, and the Judicature Act (Ireland), 1877, sections 4 & 21.]

Murphy K.C. and *MacDermott* for the plaintiff :—

These defendants have given under their hand a warrant of attorney to enter judgment in the then existing Courts. They have entered into this agreement, but it is argued on their behalf that as from the appointed day the warrant of attorney became void. This argument is disposed of by section 40 of the Government of Ireland Act, 1920.

K.B.D. 1929.

SIMMS v. BURNS

MOORE L.C.J. : The point is governed by section 40 of the Government of Ireland Act, 1920. It is perfectly plain that the High Court of Justice in Northern Ireland took the place in Northern Ireland of the High Court of Justice in Ireland.

Solicitors for the plaintiff : *Macaulay, O'Neill & Martin.*
Solicitors for the defendants : *D. MacLaughlin & Sons.*

J. McC.

ESTATE OF JOHN E. F. COLLUM (1).

Jud. Commr. 1929

June 14

(N.I. 600.)

Land purchase—Allocation of purchase money—Drainage maintenance rate—Deduction from purchase money in respect of —Northern Ireland Land Act, 1925 (15 & 16 *Geo.* 5, *c.* 34), *s.* 27.

The estate of C. vested in the Land Purchase Commission by virtue of the provisions of the Northern Ireland Land Act, 1925. On the allocation of the purchase money, a deduction, pursuant to section 27, was allowed, in respect of a drainage maintenance rate levied on the lands and paid by the vendor prior to the sale.

CLAIM appearing on final schedule of incumbrances.

The estate of John E. F. Collum became vested in the Land Purchase Commission under the Northern Ireland Land Act, 1925. Prior to such vesting, the landlord had paid a drainage maintenance rate, levied on the lands by the Lough and River Erne Drainage and Navigation District Board.

On the allocation of the funds in Court, a claim was made by a tenant on the estate for a deduction pursuant to section 27 of the Northern Ireland Land Act, 1925, by reason of the fact that this drainage rate had been paid by the landlord in respect of his holding.

The average annual expenditure by the Board on this holding for the ten preceding years had amounted to £2 8s. 8½d.

In an affidavit filed on behalf of the tenant, Mr. B. Leslie Winslow deposed to the fact that in all cases of holdings within the drainage district, with which he had been concerned, the fair rents had been fixed on the basis that the landlord paid the drainage rate.

Sheil for the tenant.

The payment of the drainage rate by the landlord was for the benefit of the holding within the meaning of section 27, sub-s. 1, of the Northern Ireland Land Act, 1925. The landlord received a higher rent by reason of the fact that he paid the rate, and in this way he obtained

(1) In the Court of the Land Purchase Commission before Megaw, K.C., Judicial Commissioner.

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the benefit of the works. It would be unfair that he should now escape liability, and throw the burden of maintaining the works on the tenant.

Marrinan for the landlord.

Section 27 is only intended to apply to works of a purely local character which have been maintained by the landlord at his expense. An extensive scheme affecting a large area does not come within the scope of the section. In *Earl of Enniskillen* v. *Reilly* (1) it was decided that the tenant of a holding within a drainage area is the person liable to pay the drainage rate. Such payments take the form of increased rent, but are in the nature of a drainage tax, and essentially different from the contract rent paid for the occupation of the holding.

The practical effect of the drainage scheme was that the tenant received the benefit of the works, and accordingly no deduction from the purchase money should be allowed in respect of the drainage rate.

[He also referred to *Trustees of Lough Neagh Drainage* v. *M'Donald* (2) and *Attorney-General* v. *Wilson* (3).]

THE JUDICIAL COMMISSIONER: I have been referred to the case of *Earl of Enniskillen* v. *Reilly* (1) which was concerned with the liability for an increased rate levied on the tenant after the fixing of a fair rent. Though the decision in that case cannot govern the present, inasmuch as section 27 of the Northern Ireland Land Act, 1925, is based on actual expenditure by the landlord, whether directly or indirectly, it is not without a bearing. The judgment of Gibson, J., seems to have considerable relevance. He offers no opinion as to the power of the Land Commission to take into consideration the benefit derived from the drainage works under the drainage code to the tenant, in fixing a rent, that not being relevant to the case before him, as the drainage rate had been imposed on the tenant after the fixing of his rent. It would seem to me that such a benefit would necessarily be taken into account in a subsequent judicial rent. The Land

(1) 27 I.L.T.R. 82. (2) 45 I.L.T.R. 139.
(3) 31 L.R.Ir. 28

Commission valued the lands as they were, including any benefit arising from drainage, and could only allow as a deduction the value of the improvements made by the tenant, and I understand that in practice the Land Commission did fix an increased rent by reason of the drainage advantages. Under the rules of the present Act this would be reflected in the price, and probably accounts for the wording of section 27.

Whatever may be the policy involved, the Court must construe the actual language of the Statute. The section reads as follows:—

"27.—(1) Where it appears to the Commission that any watercourse, drain . . . has, prior to the sale of the holding, been cleansed or maintained in whole or in part by the landlord or at his expense for the benefit of the holding . . . and whether under the terms of the contract of tenancy or otherwise, the Judicial Commissioner may direct that there shall be deducted from the purchase money, . . . a sum whether in money, stock or bonds, which, in his opinion, will yield an income equivalent to the average annual expenditure incurred by the landlord in such cleansing or maintenance during the period of ten years preceding the date of the passing of this Act, as estimated by the Judicial Commissioner."

I should like to emphasise the words "or at his expense" and "whether under the terms of the contract or otherwise." These words seem to me to bring the present case within the section, and consequently there must be deducted from the purchase money a sum which will produce an amount equal to the average expenditure by the Drainage Board in the maintenance of the works during the last ten years. The sum is very small, and the future liability for the rate will rest on the tenant, while the duty of cleansing the watercourse and drains will rest on the Drainage Trustees. I think the practical working out of the matter might best be accomplished, if the Ministry of Finance so consent, by transferring the cash to the Ministry to be applied in reduction of the advance, which will consequently result in the reduction of the annuity. The natural scheme to be adopted in the case is to let the drainage responsibility remain in the hands

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of the Drainage Trustees. The tenant, as the new owner, will pay the rate, and he will get the advantage of the sum deducted under section 27.

Solicitor for the tenant : *B. Leslie Winslow.*
Solicitor for the landlord : *Charles O'Brien.*

J. D. C.

ESTATE OF ELIZABETH CROWE (1).

Jud. Commr. 1929

May 10, 17

(N.I. 105.)

Land purchase—Allocation of purchase money—Lease for lives not renewed—Person having power to sell—Recovery of renewal fines—Northern Ireland Land Act, 1925 (15 & 16 *Geo.* 5, *c.* 34), *ss.* 8 *and* 17.

The estate of C. became vested in the Land Purchase Commission under the provisions of the Northern Ireland Land Act, 1925. The lands in question were held by the vendor under two leases for lives, renewable for ever, which provided for the payment of renewal fines on the death of each of the lives mentioned in the leases. Prior to the vesting all the lives in both leases had failed, but no renewals or fee farm conversion grants had been obtained by the vendor. On the allocation of the purchase money the Earl of S., to whom the renewal fines would have been payable, claimed to be entitled to recover the arrears of such fines out of the funds in Court.

Held, that C., having failed to obtain renewals of the leases, was not "a person having power to sell" within the meaning of section 8 of the Northern Ireland Land Act, 1925.

And *Held*, nevertheless, that as the Earl of S. had allowed the sale to go through on the basis that C. should acquire the estate claimed, by discharging the liabilities incident to such acquisition, he was entitled to be recouped in respect of the fines which would have been payable if renewals of the leases had been granted.

CLAIM appearing on final schedule of incumbrances.

The lands which formed the estate of Elizabeth Crowe were held by her under two leases for lives, dated 24th June, 1829, each of which contained a covenant for perpetual renewal and provided for the payment of a renewal fine of £1 5s. 0d. on the death of each of the lives mentioned in the leases. On the "appointed day" all the lives mentioned in the leases had failed, but the vendor had not taken any steps to obtain fee farm conversion grants, nor had she applied for renewals of the leases.

The lands in question vested in the Land Purchase Commission under the provisions of the Northern Ireland Land Act, 1925, and Elizabeth Crowe, through her solicitor, furnished particulars as required by section 17, and in the originating affidavit claimed to be the person having power to sell the lands. The provisional and final

(1) In the Court of the Land Purchase Commission before Megaw, K.C., Judicial Commissioner.

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lists were accordingly published, and on the allocation of the purchase money the Earl of Shaftesbury, in whom the lessor's interest in the leases were vested, claimed to be entitled (in addition to the redemption price of the head rents) to the arrears of the fines which should have been paid on the deaths of the persons for whose lives the lands were held.

Monroe K.C. for the claimant :—

Having failed to obtain renewals of the leases, the vendor is, in law, only a tenant from year to year, and is not a person having power to sell within the meaning of the Land Purchase Acts. If, however, she wishes to take advantage of the Acts and claims to be entitled to the purchase money, she must do equity and discharge all the payments for which she would have been liable if she had been in the position which she has assumed.

[He referred to *Estate of Ryan* (1).]

Porter for the vendor :—

The arrears of the renewal fines could not be recovered by action, and since no renewals of the leases have been asked for by the vendor, she is relieved from all liability in perfecting the title which the Land Purchase Commission obtains.

If the sale had been a voluntary sale under the earlier Acts, the vendor would have been liable to pay the fines as indicated in *Estate of Ryan* (1), but, as the sale is compulsory, she should receive the purchase money, discharged from all liability in respect of the arrears claimed.

The claimant has allowed the sale to proceed on the basis that the present vendor is the person entitled to sell. Consequently it is now too late for him to make the claim which he is seeking to sustain.

Cur. Adv. Vult.

May 17

THE JUDICAL COMMISSIONER : On the ruling of the schedule in this small estate there appeared at items Nos. 3 and 4, claims by the Earl of Shaftesbury in respect of two rents with fines, heriot and leet money reserved by two leases for lives renewable for ever, dated 24th June,

(1) [1908] 1 Ir. 467.

1829. The respective rents reserved were £3 6s. 8d. and £6 14s. 3d., but in addition, the leases in each case, in the usual form, provided for the payment of a renewal fine of £1 5s. 0d. on the death of each of the lives mentioned in the leases, and also for the payment of small sums for heriot and leet money.

Notice of motion was served on behalf of the tenant for an order fixing the redemption price of the rents on the assumption that the sole amounts chargeable against the estate were those fixed on the basis of the sums of £3 6s. 8d. and £6 14s. 3d., regardless of the reservation of heriot and leet, and the incidence of the renewal fines.

During the hearing Mr. Porter, who appeared for the tenant, on ascertaining that leet money had been paid annually prior to the coming into operation of the Land Purchase Acts, abandoned this claim, and it was agreed that the redemption prices should be fixed at sums of £3 9s. 5d. and £6 17s 0d. respectively.

A more serious question remained, reserved for the Court by the Examiner—in regard to arrears of fines and septennial fines in respect of the sum of £1 5s. 0d. payable on the deaths of the persons for whose lives the lands were held.

It appeared that at the appointed day all the lives had failed, and renewals or fee farm grants had not been taken out.

The rents on the holdings were second term judicial rents fixed between 15th August, 1896, and 16th August, 1911, and these had been paid to the owner or her predecessors in title for a great many years.

The lands were clearly "tenanted lands" under the definition given in section 20 of the Northern Ireland Land Act, 1925.

Under section 17 of the Act it is provided:—

> "17.—(1) It shall be the duty of every person who is entitled to the rents and profits of any land or who receives such rents and profits on behalf of any other person, or who has in his possession or custody any deeds or other documents relating to such land, rents, or profits, if so required by the Commission, to furnish in writing to the Commission, such information, maps,

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particulars, and documents, with respect to the land in such form and verified in such manner and within such time as the Commission may by a general or special notice require.

"(2) The Commission shall from time to time publish provisional lists of the land which will become vested in the Commission on the appointed day by virtue of this part of this Act, together with notice of the manner in which and the time within which objections may be made to the list by reason of the inclusion or non-inclusion therein of any land, and shall publish such other notices as may be required by rules made under this Act."

No objections were taken under sub-s. 2, and final lists have been duly published. Accordingly the provisions of section 8 become applicable—

"8.—(1) Subject to the provisions of this Act, and notwithstanding anything in section nine of the Act of 1903, all tenanted land in Northern Ireland, shall on the appointed day, by virtue of this part of this Act vest in the Commission in the like manner and with the like consequences as if vesting orders had been made on the appointed day in respect thereof under section sixteen of the Act of 1903, in pursuance of new purchase agreements for the purchase of the same at the standard price entered into on the appointed day by the Commission with persons having power to sell under the Land Purchase Acts.

"(2) A purchase agreement deemed to have been entered into for the purposes of this section shall be deemed to have been entered into with the owner of the interest of the immediate landlord where that interest is sufficient to constitute the owner thereof a person having power to sell under the Land Purchase Acts, and, where that interest is not sufficient, to have been entered into with the owner of the interest of the next superior landlord whose interest is sufficient."

In both of these sub-sections we have precise and distinct references to persons "having power to sell under the Land Purchase Acts," and in coming to a decision on the question before me it is necessary to consider who are persons having power to sell lands under the Land Pur-

chase Acts. The whole land code from the Act of 1870 to the Act of 1925 has a bearing on this, though I think I am right in stating that no section of the code gives an exhaustive category of persons having power to sell..

Section 33 of the Landlord and Tenant (Ireland) Act, 1870, is the first to give any light in the search for a person having power to sell. This section contains a provision that no holding of leasehold tenure shall be sold under the Act unless the lease under which the landlord is possessed of the land is a lease for lives or years renewable for ever or a lease for a term of years of which not less than 60 are unexpired. Sections 5 and 6 of the Purchase of Land (Ireland) Act, 1885, apply the provisions of the Settled Land Acts so as to extend the class of vendors.

In the definition section (section 34) of the Land Law (Ireland) Act, 1887, the word "landlord" for the purpose of sales is made to include a trustee for sale and any limited owner as defined by section 33 of the Act of 1870.

So far as I can see, the next relevant enactment on this subject is section 17 of the Irish Land Act, 1903. This merely simplifies the procedure, and enables the Land Commission to deal with a person in receipt of the rents and profits of land for not less than six years who has given prima facie evidence that he is a person having power to sell under the Land Purchase Acts as owner of the land for all purposes other than the distribution of the purchase money. There is no new definition, and we are driven back to the sections to which I have referred.

Reverting to section 8 of the Act of 1925, it seems clear that whoever may be the persons having power to sell under the Land Purchase Acts, tenanted land vests absolutely in the Commission as if vesting orders had been made under section 16 of the Act of 1903 discharged from all claims—and that these claims henceforth are attached to the purchase money, whether they are in respect of superior or intervening interests or incumbrances, as immediately before the date of the vesting they attached to the land.

Section 31, sub-s. 8, of the Act of 1896 defines "superior interest" by classifying various rights which are to be included. As Palles C.B. said in *Burchall* v.

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Coyle (1), "It is impossible to imagine words more comprehensive" than the words of that sub-section.

In distributing the purchase money under the Act of 1925 we are ever driven back to the consideration of the title of the "person having power to sell" and his rights, estates and interests. The notional agreement created by section 8 of the Act is indissolubly associated with this person being a party to it, the other party being the Commission.

In this case Elizabeth Crowe has come forward as the person having power to sell under the Acts, and through Mr. McNinch, her solicitor, in her orginating affidavit filed in the matter, says:

> "The said Elizabeth Crowe is a person having power to sell under the Land Purchase Acts the lands particulars of which are set forth in the first schedule hereto."

Is that statement accurate? Can she sell?

So far as I am able to form an opinion, as matters stood when the affidavit was made and as they now stand, she has not the right or power to sell until she has taken some steps which she had power to take and had not taken. She has properly filled up the form required by section 17 to show that these are tenanted lands, and that she is in receipt of the rents—but investigation shows that, at present, in law she is but a tenant from year to year. Accordingly, under the Acts all her rights at present are those dependent on an intervening interest. The only estate that would give a power of sale is that of Lord Shaftesbury—though by adopting the appropriate procedure Mrs. Crowe might have acquired a sufficient estate from him to enable her to sell—she has not done so, and the lands have now vested in fee in the Land Purchase Commission, and all claims in respect thereof are transferred to the purchase money.

The case now comes before me on the distribution of the purchase money—Mr. Porter, for the owner, claims that as the arrears of the £1 5s. 0d. renewal fine cannot be recovered by action, and as the owner has not asked for a renewal of her lease or a fee farm grant, she is relieved from all liability in the perfecting of a title which

(1) 37 I.L.T.R. 176.

is given to the Land Purchase Commission under the Act of 1925—that while, if the case had been a voluntary sale, she would, as is indicated in *Estate of Ryan* (1), have been liable to pay the arrears—the sale is a compulsory sale, and his client is entitled to the purchase money discharged from any liability in respect of arrears.

Mr. Monroe, on the other hand, contends that Mrs. Crowe is not a person entitled to sell under the Land Purchase Acts, and that if she is to take advantage of the Acts in regard to the purchase money she must do equity and discharge all the liabilities she would be under if she were to put herself in the position she has assumed—a person having a power to sell under the Land Purchase Acts.

If I accede to this argument I must treat the arrears of fines, &c., as a superior interest. The only alternative course open is to regard the Earl of Shaftesbury as a vendor, and the interest of Mrs. Crowe as an intervening interest. The result of either of these might possibly be the same. In any case, as Mr. Monroe's client has been satisfied to let the sale go through on the basis that Mrs. Crowe should acquire the estate she has claimed to possess by discharging the liabilities incident to such acquisition, I feel bound to decide that the purchase money is liable to recoup him for the amount to which he would have been entitled on the grant of a renewal.

No question arises as to the amount. Accordingly I allow the items in question with costs of the argument. The bonus will, as the result of this decision, become payable to Mrs. Crowe, and I remove the stay.

I decide the question therefore on the broad ground that, if the owner was to constitute herself a person having power to sell under the Land Purchase Acts—she would be obliged to discharge these arrears and fines. While I acquiesce in Mr. Porter's argument that these are not in themselves a charge on the lands, the action of the vendor herself by claiming to be a person having power to sell and carrying through the sale till it has reached the present stage, and the head landlord having acquiesced in this procedure subject to his claim to arrears

(1) [1908] 1 I.R. 467.

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being satisfied, these arrears must now in my opinion be regarded as a superior interest which requires to be taken into account in the allocation of the purchase money.

Solicitor for the claimant: *John Bristow.*
Solicitor for the vendor: *J. W. McNinch.*

J. D. C.

ESTATE OF GEORGE THOMAS GRAHAM (1).

Jud. Commr. 1929

July 2, 9

(N.I. 894.)

Land purchase—Standard purchase annuities—Fixing rent by agreement—Period when fixed—Date of agreement, or of its being filed—Northern Ireland Land Act, 1925 (15 & 16 *Geo.* 5, *c.* 34), *Sched. III.*

A number of holdings on the estate of G. were subject to judicial rents which had been fixed by agreements which were entered into before 15th August, 1911, and filed in the Irish Land Commission after that date.

By virtue of Sched. III to the Northern Land Act, 1925, judicial rents fixed after 15th August, 1911, are deemed to be third term judicial rents, and the standard purchase annuities of the holdings are calculated accordingly.

When the estate was about to become vested in the Land Purchase Commission, the holdings in question were described in the provisional list as being subject to third term judicial rents. The tenants affected objected to their holdings being so described.

Held, that the dates upon which the agreements were signed were the dates upon which the rents were fixed, and accordingly the tenancies should have been treated as being subject to second term judicial rents.

Church v. *M'Poyle* [22 I.L.T.R. 85] applied.

Objections to the provisional list by a number of tenants on the ground of the misdescription of their holdings.

The rents of a number of tenancies on the estate of George Thomas Graham had been fixed by agreements which were filed in the Irish Land Commission in accordance with the provisions of the Land Law (Ireland) Acts. These agreements had in each case been signed by both the landlord and tenant before 15th August, 1911, but had not been filed until after that date.

Under the provisions of Sched. III to the Northern Ireland Land Act, 1925, for the purpose of calculating the standard purchase annuities, judicial rents which were fixed between 15th August, 1896, and 16th August, 1911, are treated as second term judicial rents, while rents fixed after 15th August, 1911, are treated as third term rents.

(1) In the Court of the Land Purchase Commission before Megaw, K.C., Judicial Commissioner, and Wilson and Macoun, Land Purchase Commissioners.

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When the estate was about to become vested in the Land Purchase Commission the holdings in question were described in the provisional list as being subject to third term judicial rents. The tenants objected to their holdings being so described, and contended that their rents were fixed before the crucial date, and accordingly that their holdings should have been described as being subject to second term rents.

Porter for the tenants :—

The actual date upon which the agreement is completed is the deciding factor. In each of the present cases the agreement was signed by both parties before 15th August, 1911. This being so the judicial rents were fixed before the crucial date within the meaning of the Act, and should have been described as second term judicial rents. In *Church* v. *M'Poyle* (1), Palles C.B. held that in the case of an agreement entered into in accordance with the provisions of section 8, sub-s. 6, of the Land Law (Ireland) Act, 1881, the date of the execution of the agreement, and not the date of its being filed, is the date of the fixing of the rent. In *Lord Bellew's Estate* (2), Ross J. decided that oral agreements concluded between a landlord and his tenants and subsequently reduced to writing were "entered into" on the date of the oral agreements.

MacDermott for the landlord :—

Neither the landlord nor the tenant is bound by an agreement fixing the rent until it is filed. *Girvan* v. *Moffat* (3) and *Woodside* v. *Massy* (4). Accordingly the rents cannot be said to have been fixed within the meaning of Sched. III to the Act of 1925, until the process of filing has been completed.

The wording of clause 6 of Part II of Sched. III expressly provides that a rent fixed by agreement is not to be deemed a judicial rent until the agreement has been filed. The whole scheme of the Act of 1925 is to base the compulsory purchase price on a rent fixed by a judicial act, and there is nothing judicial in the fixing of a rent by agreement.

[He also referred to *Conyngham* v. *Gallagher* (5)].

Cur. adv. vult.

(1) 22 I.L.T.R. 85.
(2) [1921] 1 Ir. 174.
(3) 14 L.R. Ir. 252.
(4) 28 L.R. Ir. 604.
(5) 23 I.L.T.R. 10.

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ESTATE OF GEORGE THOMAS GRAHAM

July 9

THE JUDICIAL COMMISSIONER: These cases have been very well argued. The decision, however, must rest upon a very small point—when were the rents that were third term judicial rents, fixed within the meaning of Sched. III to the Act of 1925?

The Land Purchase Commission in the provisional list have treated them as third term rents, which undoubtedly they were in name. Clearly, however, the phrases "first term," "second term" and "third term" have artificial meanings in the Act of 1925, and the policy of the legislature seems to have been to have special regard to the date upon which the rents were fixed, recognizing that different standards of fixing rents applied at different times. There must always be a grievance when a line has to be drawn; the legislature has drawn definite lines, and it is for the Court to decide on which side of the line any case falls. The same question has arisen in different forms under previous Lands Acts.

In the temporary Acts dealt with in *Church* v. *M'Poyle* (1), the Judicial Commissioner had regard to the policy of the legislature, and I with all respect think his decision carried out the clear intent of the legislation.

There have been other cases under the Acts of 1903 and 1909 where the same principle was followed, of which the most striking was *Lord Bellew's Estate* (2), in which oral agreements were verbally made before, and signed after a crucial date like the present, though unless they had been signed the agreements would have been invalid. In that case Ross J. held that they had been entered into at the date of the oral agreements.

Very similar cases came before me in *Irwin's Estate* (3), where third term rents had been fixed by the Land Commission before 16th August, 1911. These cases were argued by solicitors, and I had not the advantage of having any cases cited as I had in the present case.

I then decided that it was not the date of the commencement of the statutory term created by the order but the date of the order that determined the category into which a particular rent would fall.

The present cases differ in an important particular from the cases in *Irwin's Estate* (3). In those cases there was

(1) 22 I.L.T.R. 85 (2) [1921] 1 Ir. R. 174
(3) Unreported.

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ESTATE OF GEORGE THOMAS GRAHAM

a definite decision of the Court prior to 16th August, 1911. In the present cases the agreements could not become effective unless the agreements were filed. But that is not conclusive. They have been filed, and they have acquired full validity, and the question remains—on what date did the parties fix the rent. Having regard to the policy of the Act and the decisions which have been cited, I do not think that the proviso in Sched. III, Part 2, clause 6, really precludes me from following the decision I have given in *Irwin's Estate* (1). It is intended to prevent irregular agreements being set up, but I think when an agreement has been filed and acquired validity one is entitled to look at the date of its signature, just as one would look at the date of the swearing of an affidavit which may not be filed until some time after it has been sworn. Once the agreement has been made in proper form, unless some third party intervened or unless there was some fraud or surprise (Rules of 1897—139-143) it would be filed as a matter of course.

We really are not concerned with the date from which the rent will run. My previous decision disentitles me to have regard to it. We must look to the fixing of the rent within the meaning of the Act and that only. The Chief Baron Palles decided that, for the purpose of another Act, the date is the actual date of the agreement. Whether one applies the doctrine of relation back or the doctrine that when you have an agreement which may be given in evidence you can determine on what date it was made the same result follows. I am clearly of opinion that the date on which the agreements were signed by the parties who last signed them respectively, are the dates of fixing within the meaning of the Act, and the rents in these cases must appear as second term rents in the final list.

Solicitors for the tenants: *John K. Currie & Son.*
Solicitors for the landlord: *J. & A. Caruth & Owens.*

J. D. C.

(1) Unreported.

[IN THE COURT OF APPEAL.]

C.A. 1929.

July 5, 10

BRADSHAW v LEMON (1).

Lease of premises—Additional rent in respect of breaches of covenants of varying importance—Penalty or Liquidated Damages—Measure of Damages.

A lease provided that on breach of any of certain covenants the lessees should forfeit and pay unto the lessor a further additional rent or sum of fifty pounds sterling. The trial judge, Moore L.C.J., decided that this additional yearly rent was not in reality rent, but was in the nature of a penalty; and taking as the measure of the damages the injury to the reversion, he assessed the damages at the sum of one shilling.

Held, by the Court of Appeal (Andrews and Best L.JJ.), affirming Moore L.C.J., that the additional rent was in the nature of a penalty, and that the damages had been assessed on a proper basis.

APPEAL from the judgment of Moore L.C.J. in an action in the King's Bench Division in which the plaintiff claimed a sum of £883 5s. 0d. for rent due by the defendants.

By deed of 9th September, 1919, the plaintiff demised to the defendants a plot of ground and buildings thereon situate in Enniskillen for the term of twelve years from 1st November, 1918, at the yearly rent of £100, payable quarterly. The lease contained the covenants usual in such cases, and there was also a special covenant by the defendants, in consideration of the demise, to spend a sum of £420 in putting these premises into a state of repair within two years of the date of the deed, and in case the repairs were not finished within the two years the rent of £100 per annum was to be increased by £50 per annum.

The defendants had also covenanted to paint the cement on the front and gable of the premises with two coats of the best paint, and in every fourth year to paint with two coats of best oil paint the doors and all exterior woodwork of the premises, and that they would well and sufficiently repair, maintain, preserve and keep all and every part of the said premises, buildings and messuages in good and substantial order, repair and condition; and would yield them up in like good order, repair and condition; and they also covenanted not to use any part of

(1) In the Court of Appeal before Andrews and Best, L.JJ.

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the front of the house for bill-posting or hoarding, or follow or carry on or permit or suffer to be followed or carried on in the premises the business of a tavern, ale house, soap boiler or any other offensive or noisy trade or business; and it was provided that on breach of any of these covenants or any part thereof the present demise should be utterly null and void to all intents and purposes as if the same had never been made, or that otherwise at the election of the lessor the lessees should forfeit and pay unto the lessor from the time of the breach of any of these covenants or any part thereof a further additional yearly rent of fifty pounds sterling to be paid quarterly in the same manner as the said other rent, and to be recovered by action of debt, distress or otherwise as the said yearly rent was recoverable. Breaches of these covenants or some of them were alleged, and in respect of them, plaintiff sued for £369 10s., being at the rate of £50 per annum from 9th September, 1919, to 1st February, 1927.

Moore L.C.J., who tried the case without a jury, held that the additional yearly rent was not in reality rent, but was in the nature of a penalty, and he assessed plaintiff's damages for the breach of the covenant at the sum of one shilling.

The plaintiff appealed on the grounds that the Lord Chief Justice misdirected himself in point of law in holding that the further additional rent of £50 was a penalty, that the damages awarded were inadequate, and that the finding of the Lord Chief Justice as to the amount of the damages was against evidence and the weight of evidence.

Murphy K.C., *Lowry K.C.*, and *MacDermott* for the plaintiff :—

The finding of the Lord Chief Justice should be set aside. An error in principle affected the Lord Chief Justice's judgment. We submit that the Lord Chief Justice misdirected himself in holding the rent to be a penal rent. We rely on *Lurcott* v. *Wakely & Wheeler* (1). The test is, what sum would it take to repair these premises, taking into consideration that there were

(1) [1911] 1 K.B. 905

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eighteen months of the lease to run. We also rely on *Clydebank Engineering & Shipbuilding Company Limited* v. *Don Jose Ramos Yzquierdo y Castaneda* (1) and *Dunlop Pneumatic Tyre Company Limited* v. *New Garage and Motor Company Limited* (2). This is not a penal rent, and therefore the plaintiff is entitled to recover the sum he claims. Alternatively the sum of one shilling is not the sum which should have been awarded to the plaintiff. As there are eighteen months of the lease unexpired, one shilling cannot be fair compensation. The question of damages has not received adequate consideration. We submit there should be a new trial.

Pringle K.C. and *McCoy* for the defendants :—

On the question of whether the rent was a penal rent or not, we rely on *Willson* v. *Love* (3), and especially on the judgment of Lord Esher at pp. 629—631. We rely on the judgment of James L.J. at pp. 731—732 in *In re Newman Ex parte Capper* (4). The proper basis for assessing damages is the diminution in the value of the reversion. *Conquest* v. *Ebbets* (5). The Lord Chief Justice acted on a perfectly correct principle in assessing the damages. We submit that his judgment was right, and should be upheld.

[They also referred to *Clydebank Engineering & Shipbuilding Company Limited* v. *Don Jose Ramos Yzquierdo y Castaneda* (1), *Dunlop Pneumatic Tyre Company Limited* v. *New Garage and Motor Company Limited* (2), *Ford Motor Company (England) (Limited)* v. *Armstrong* (6), and *Ebbets* v. *Conquest* (7).]

Cur. Adv. Vult.

June 10

ANDREWS L.J.

ANDREWS L.J. : In this case the plaintiff appeals from that portion of an order of the Lord Chief Justice made on 30th January, 1929, by which he held that a rent of £50 sued for in paragraphs 5 and 6 of the statement of claim was in the nature of a penalty, and that the plaintiff was therefore only entitled to such damages as he could

(1) [1905] A.C. 6
(2) [1915] A.C. 79
(3) [1896] 1 Q.B. 626
(4) 4 Ch.D. 724
(5) [1896] A.C. 490
(6) 31 T.L.R. 267
(7) 16 T.L.R. 320

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prove. These damages the Lord Chief Justice measured at the sum of one shilling, and for this sum he, accordingly, gave judgment with costs of suit. The plaintiff asks that the judgment be set aside, and that judgment be entered for him for the sum of £369 15s. 0d., or, alternatively, that a new trial be ordered.

The only questions argued before us were whether the learned Lord Chief Justice was right in holding that the said rent of £50 was in the nature of a penalty; and, if he was correct in so holding, whether the damages of one shilling which he awarded were inadequate.

By lease, dated 9th September, 1919, the plaintiff demised to the defendants certain premises situate in the town of Enniskillen consisting of a shop, dwelling-house, yard and out offices, which were then in the occupation of the defendants for the term of twelve years from 1st November, 1918, at the rent of £100, payable quarterly in every year. The lease contained the usual provisions for distress and re-entry, and a covenant by the defendants for payment of the rent, rates and taxes. Then followed a further covenant by the defendants that, owing to dilapidations caused during the defendants' present tenancy, they would within two years put the demised premises into a state of thorough repair according to the estimate of a Mr. Harvey at a cost of at least £420 16s. 9d.; and a proviso that if the works included in the estimate should not be completely finished within two years the said rent of £100 should be increased by the annual sum of £50, and during the residue of the term or so long as the said works should be unfinished the annual sum of £150 should be the rent reserved. Next followed covenants by the defendants for insurance, for the execution of sanitary works, for painting the cement on the front and gable of the premises, for keeping the premises in repair, and also against using any part of the front of the house as a bill posting hoarding, and against carrying on offensive trades in the premises. These covenants and provisions are followed by the clause with which alone we are directly concerned in this appeal, and which, by reason of its importance, I shall set out *verbatim*, namely, "that on breach of any of these covenants or any part thereof this present demise shall be utterly

null and void to all intents and purposes as if the same had never been made or that otherwise at the election of the lessor the lessees shall forfeit and pay unto the lessor from the time of the breach of any of these covenants or any part thereof a further additional yearly rent or sum of £50 sterling, to be paid quarterly as the said other rent and to be recovered by action of debt, distress or otherwise as the said hereby reserved yearly rent is recoverable anything herein contained to the contrary in anywise notwithstanding."

The construction of this covenant is a matter of some difficulty. I agree with Mr. Murphy that this additional rent of £50 is payable quarterly, as this is expressly provided, but I look in vain for any words similar to those contained in the covenant for payment of the first mentioned rent of £50, which would make the liability for this rent terminate if and when the breach of covenant were remedied; and it is difficult to imply words of limited duration in regard to the second rent which are expressed in regard to the first. Were it necessary, therefore, to decide the point I would not, as at present advised, be prepared to hold with Mr. Murphy's contention that liability for this second rent of £50 could be determined at any time by remedying the breach and paying the sum of £12 10s. 0d. as the then current quarter's instalment of such additional rent. It is unnecessary, however, to express any concluded opinion on the point, as there are other features of the liability for this rent which satisfy me that the Lord Chief Justice was perfectly right in holding that it was penal in character, and that the £50 must not be regarded as in the nature of liquidated damages.

In the first place, it is to be observed that on breach of any covenant the lessor is given an alternative remedy. He is entitled to elect whether the demise should be "utterly null and void to all intents and purposes"—a right against which, no doubt, a court of equity would in a proper case grant relief under section 14 of the Conveyancing Act, 1881, yet one which is obviously penal in character. In these circumstances it would not be unreasonable to suppose that the alternative right—the additional rent of £50—was likewise penal. The view

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that it is such is in my opinion also supported, though not determined, by the expression that the lessees should "*forfeit* and pay" this rent to the lessor—the significance of the use of this word "forfeit" is referred to by Lord Dunedin in *Public Works Commissioner* v. *Hills* (1), in which (at p. 375) he says that the word "forfeited" is "peculiarly appropriate to penalty, and not to liquidated damages."

It is necessary, however, to consider briefly, so far as applicable, the general principles upon which the Courts act in determining whether a named sum is to be regarded as a penalty or as liquidated damages. These principles have been enunciated so frequently during the last quarter of a century in both the House of Lords and the Privy Council that there can be no longer any doubt in regard to them. Amongst these cases may be cited *Clydebank Engineering & Shipbuilding Co., Ltd.*, v. *Don Jose Ramos Yzquierdo y Castaneda* (2), *Public Works Commissioner* v. *Hills* (1), *Webster* v. *Bosanquet* (3), and *Dunlop Pneumatic Tyre Co., Ltd.*, v. *New Garage & Motor Co., Ltd.*, (4). From these cases it is clear that the essence of a penalty is a payment *in terrorem*, whilst the essence of liquidated damages is a genuine covenanted pre-estimate of damage. Hence if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest amount of damage which could have possibly been in the contemplation of the parties when they made the contract, it is a penalty. The mere fact, however, that precise pre-estimation of damage is almost an impossibility is not a reason for a named sum being regarded as a penalty. On the contrary, it is just in such a case, where precise proof of damage would be difficult or complex, that the parties may reasonably be said to have intended the sum which they named to be a pre-estimate which would avoid all such difficulties of proof. Again, there is a presumption (though one which is rebuttable) that when a single indiscriminate lump sum is made payable by way of compensation on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage, such sum

(1) [1906] A.C. 368
(2) [1905] A.C. 6
(3) [1912] A.C. 394
(4) [1915] A.C. 79

is a penalty; and the strength of the chain must be tested on its weakest link, so that if it be clearly established that the loss on one particular breach could never possibly amount to the stipulated sum, it must be regarded as a penalty. On the other hand, if, though there be several stipulations of varying degrees of importance, the damage likely to accrue from each is the same in kind, and the same agreed sum could be properly construed as a fair and reasonable pre-estimate of probable damage, the named sum would be held to be in the nature of liquidated damages. Enormous disparity of the sum to any conceivable loss will point one way; while the fact of the payment being in terms proportionate to the loss will point the other.

When I apply these principles to the facts of the present case I have no hesitation in holding that this additional rent of £50, imposed in respect of breaches of covenant of varying importance and different in kind, must be regarded as fixed *in terrorem* to compel the lessee's obedience to the covenants in the lease, and, therefore, in the nature of a penalty; for such a sum would in my opinion be "disproportionate to," and "wholly extravagant and unconscionable" in comparison with any damage which the parties could possibly have contemplated as resulting from the breach of such covenants, as, for example, the covenants to paint the cement, or not to use any part of the front of the house as a bill-posting hoarding.

In these circumstances it was in my opinion the duty of the learned Lord Chief Justice to assess as damages the actual loss which in his opinion the plaintiff sustained by the breach of covenant established by the evidence. The plaintiff endeavoured to prove substantial dilapidations and serious disrepair in these old premises, but this was denied by the defendants' witnesses; and in this conflict of testimony the Lord Chief Justice held that the defendants were only in default in what he calls two minor respects:—(a) the state of "disrepair" or "disappearance of the bird cage," which is referred to by the defendants' engineers as a wooden structure, and is described by the Lord Chief Justice as a plank on an outside wall under which pigeons used to sit; and (b) allowing the

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drains in the yard to get clogged up for a period of roughly two years, by reason of which the yard became water-logged. These findings of fact, it is admitted, cannot be successfully challenged as there is evidence to support them; but Mr. Murphy argues for the plaintiff that even if these facts be accepted the finding of the Lord Chief Justice of merely nominal damages cannot be sustained, as the defendants' engineer admitted that it would cost £5 to re-erect the bird cage. The fallacy underlying this argument is that the measure of the plaintiff's damages is not, as is assumed, the present cost of re-erection. The plaintiff is merely a reversioner, who at the time of the trial was not entitled to possession of the premises for a period of almost two years. It is as such reversioner only that he is entitled to compensation for his loss. In *Doe d. Worcester Trustees* v. *Rowlands* (1), Coleridge J. said that in such a case "the true question is to what extent is the reversion injured by the non-repair of the premises?" In *Conquest* v. *Ebbetts* (2) Lord Herschell, whilst stating that damages must be assessed at such a sum as reasonably represents the damage which the covenantee has sustained, applied the test "of inquiring how much the value of the respondents' reversion has been diminished by the breach of covenant." The question was also considered and determined in the well known Irish case of *Metge* v. *Kavanagh* (3), in which the Court of Exchequer held that the damages in such case may, but need not necessarily, be the present value of a sum equal to the cost of repair, that sum being payable at the end of the term, or they may, but need not necessarily, be the injury caused by the want of repair to the saleable value of the reversion. It was further held that save in very extreme cases it was the province of the jury to decide which of these modes was, in the particular case, the appropriate one.

In my opinion there was nothing in the facts and circumstances of the present case which would justify this Court in holding that the learned Lord Chief Justice acted on an erroneous principle in adopting one of the two recognized modes and in taking, as he did, the measure of damages as "the injury to the reversion." So acting he

(1) 9 C. & P. 734 (2) [1896] A.C. 490
(3) I.R., 11 C.L. 431

thought nominal damages constituted adequate compensation for what he described as a technical breach. With this finding we cannot in my opinion interfere; for it may well be that neither of the trivial matters referred to would cause the slightest depreciation in the saleable value of the reversion.

For these reasons the plaintiff's motion must be dismissed with costs.

BEST L.J.

BEST L.J. : The two questions argued in this case were whether an additional rent of fifty pounds per annum payable by the defendants in certain events was in reality rent or in the nature of a penalty, and if in the nature of a penalty whether damages to which the plaintiff was found entitled were assessed on a proper basis.

By deed of 9th September, 1919, plaintiff demised to defendants a plot of ground and buildings thereon situate in Enniskillen for the term of twelve years from 1st November, 1918, at the yearly rent of one hundred pounds payable quarterly. The lease contained the covenants usual in such cases, and there was also a special covenant by defendants in consideration of the demise to spend a sum of four hundred and twenty pounds in putting these premises into a state of repair within two years of the date of the deed, and in case the repairs were not finished within the two years the rent of one hundred pounds per annum was to be increased by fifty pounds per annum. There was a breach of this covenant by defendants, but the appeal is not concerned with it.

The defendants had also covenanted to paint the cement on the front and gable of the premises with two coats of the best paint and in every fourth year to paint with two coats of best oil paint the doors and all exterior woodwork of the premises, and that they would well and sufficiently repair, maintain, preserve and keep all and every part of the said premises, buildings and messuages in good and substantial order, repair and condition, and would yield them up in like good order, repair and condition; and they also covenanted not to use any part of the front of the house as a bill-posting hoarding or follow or carry on or permit or suffer to be followed or carried on in the premises the business of a tavern, ale house, soap-boiler

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or any other offensive or noisy trade or business; and it was provided that on breach of any of these covenants or any part thereof the present demise shall be utterly null and void to all intents and purposes as if the same had never been made *or* that otherwise at the election of the lessor the lessees shall forfeit and pay unto the lessor from the time of the breach of any of these covenants or any part thereof a further additional yearly rent or sum of fifty pounds sterling to be paid quarterly as the said other rent, and to be recovered by action of debt, distress or otherwise as the said yearly reserved rent is recoverable. Breaches of these covenants or some of them were alleged, and in respect of them plaintiff sued for three hundred and sixty-nine pounds fifteen shillings, being at the rate of fifty pounds per annum from 9th September, 1919, to 1st February, 1927.

The Lord Chief Justice, who tried the case without a jury, held that this so-called additional yearly rent was not in reality rent, but was in the nature of a penalty, and he assessed plaintiff's damages for the breach of the covenant at the sum of one shilling.

The appeal is taken against his decision on the grounds that he misdirected himself in point of law in holding that the further additional rent was a penalty, that the damages awarded were inadequate and that his finding as to the amount of the damages was against evidence and the weight of evidence.

In determining whether the additional rent is a penalty, one has to consider in what circumstances it becomes payable. It becomes payable at the election of the lessor on the breach of any of the covenants, or any part thereof, and is to be paid as an alternative to the demise becoming utterly null and void to all intents and purposes as if the same had never been made. If, then, the defendants were guilty of the least breach of any of the covenants, for example, if they were to allow a few bills to be posted on the front of the premises, or if they exceeded by a week or a month or two months the period of four years since the previous painting took place, or if they omitted to paint a portion of the premises, the plaintiff is entitled under the covenant to increase the rent payable by the sum of fifty pounds per annum. Mr. Murphy ingeniously

argued that as the rent is payable quarterly the increase need only take place from quarter to quarter until such time as the acts or omissions complained of were respectively discontinued or made good. I think the words of the deed do not bear this construction, because the lessees are to *forfeit* and pay to the lessor *from the time of the breach* of any covenants or any part thereof the further additional yearly rent, to be paid quarterly as the other rent, and I find no provision for going back to the "said hereby reserved yearly rent" once the additional rent has been imposed. Here the so-called rent becomes payable on the occurrence of one or more of several events, some of which may entail serious consequences to the property, and others may cause only trifling damage or no damage at all. In such a case the sum though called rent is, in my opinion, really in the nature of a penalty: see *Lord Elphinstone* v. *The Monkland Iron and Coal Coy.* (1); see also the case of *The Clydebank Engineering & Shipbuilding Co., Ltd.*, v. *Don Jose Ramos Yzquierdo y Castaneda* (2), from which it may be deduced that where the sum leviable for the breach is extravagant or unconscionable in proportion to the resulting damage it is to be regarded as a penalty. In my opinion the learned Lord Chief Justice was right in the conclusion at which he arrived in respect of this matter.

Next, it is said that the damages awarded were inadequate. There was evidence that the damages resulting from the breach of covenant complained of could only be remedied by the expenditure of hundreds of pounds, and there was also evidence given for the defendants that they were in default only to a very minor extent, and that the defects could be made good for about the sum of five pounds.

If I had been trying the case I should probably have taken a more liberal view of the sum to which plaintiff was entitled than has been taken by the Lord Chief Justice, but I am unable to hold that the principle of his decision in wrong in law; in fact, I believe it to be right. That principle is very briefly stated in the head note to *Metge* v. *Kavanagh* (3), a case to which attention was called by my colleague. The head note is as follows:—

(1) 11 A.C. 332 (2) [1905] A.C. 6
(3) I R, 11 C.L. 431

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BRADSHAW v. LEMON

BEST L.J.

In an action for breach of covenant to keep in repair, brought by the lessor or his assignee during the pendency of the term, the damages may, but need not necessarily, be the present value of a sum equal to the cost of repair, that sum being payable at the end of the term; or the damages may, but need not necessarily, be the injury caused by the want or repair to the saleable value of the reversion; and, save in very extreme cases, it is the province of the jury to decide which of these modes is, in the particular case, the appropriate one.

The Lord Chief Justice in this case performed the functions of the jury and adopted, as he was entitled to do, the second mode of estimating the damages. I see no reason for holding that he misdirected himself in law or acted upon any wrong principle.

The result will be that plaintiff's motion must be refused with costs.

Solicitor for the plaintiff: *B. Leslie Winslow.*
Solicitors for the defendants: *Falls & Pringle.*

J. McC.

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[K.B.D. 103

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JUDGMENT entered on foot of a Warrant of Attorney to confess judgment in the High Court of Justice in Ireland—Jurisdiction to enter judgment in the High Court of Justice in Northern Ireland—Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 67), s. 40. In December, 1920, the defendants, J. B. and R. B., purchased three small farms at the price of £2,250. To enable them to pay for the farms they got a loan of £1,800 from the plaintiff. The loan was secured by a mortgage of the three farms and also by a joint and several bond with warrant of attorney of the defendants. The bond and warrant of attorney were executed by all the defendants in the presence of an independent solicitor on 26th January, 1921. Judgment was entered for the plaintiff on 2nd May, 1929, on foot of the warrant of attorney, which was a warrant of attorney to confess judgment in the High Court of Justice in Ireland. *Held*, by Moore L.C.J., that there was jurisdiction to enter judgment on foot of the warrant of attorney in the High Court of Justice in Northern Ireland. *Simms v. Burns & Others.*

[K.B.D. 140

ILLICIT STILL — PENALTY *for having possession of—Mitigation of fine—Jurisdiction of justices—Illicit Distillation (Ireland) Act, 1831 (1 & 2 Wm. IV, c. 55), s. 16, s. 39—Finance Act, 1923 (13 & 14 Geo. V, c. 14), s. 13, sub-s. 1.* D. was summarily convicted by justices and fined £1 in respect of an offence under section 16 of the Illicit Distillation (Ireland) Act, 1831. The prosecutor objected to this fine, on the ground that under section 39 of the same Act, the justices could not reduce the penalty to a sum less than £6. *Held*, that the justices had jurisdiction under section 13 of the Finance Act, 1923, to impose any penalty not exceeding £500, notwithstanding the fact that section 39 of the Illicit Distillation (Ireland) Act, 1831, limits the power of mitigation by prescribing a minimum penalty of £6. *The King (Jennings) v. Justices of County Armagh.*

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LAND PURCHASE—ALLOCATION *of purchase money—Deduction in respect of works maintained by landlord—Redemption of head rent—Priority of claims—Northern Ireland Land Act, 1925 (15 & 16 Geo. 5, c. 34), s. 27.* The estate of E. vested in the Land Purchase Commission under the provisions of the Northern Ireland Land Act, 1925. On the allocation of the purchase money the Treasury claimed to be entitled to a deduction, pursuant to section 27, in respect of half the cost of the maintenance and repair of certain works on the lands. The funds in court were insufficient to redeem an annual rent payable out of the estate, and accordingly the I. Society, who were the owners of this rent, objected to the Treasury's claim and alternatively to its appearing on the final schedule of incumbrances in priority to their claim in respect of the redemption price of their rent. *Held*, that the Treasury were entitled to the deduction under section 27 of the Northern Ireland Land Act, 1925, and that this claim took priority to the redemption price of the head rent. *Egerton's Estate.*

[JUD. COMMR. 106

LAND PURCHASE—ALLOCATION *of purchase money — Drainage maintenance rate—Deduction from purchase money in respect of—Northern Ireland Land Act, 1925 (15 & 16 Geo. 5, c. 34), s. 27.* The estate of C. vested in the Land Purchase Commission by virtue of the provisions of the Northern Ireland Land Act, 1925. On the allocation of the purchase money, a deduction, pursuant to section 27, was allowed, in respect of a drainage maintenance rate levied on the lands and paid by the vendor prior to the sale. *Collum's Estate.*

[JUD. COMMR. 143

LAND PURCHASE—ALLOCATION *of purchase money—Lease for lives not renewed—Person having power to sell—Recovery of renewal fines—Northern Ireland Land Act, 1925 (15 & 16 Geo. 5, c. 34), ss. 8 and 17.* The estate of C. became vested in the Land Purchase Commission under the provisions of the Northern Ireland Land Act, 1925. The lands in question were held by the vendor under two leases for lives, renewable for ever, which provided for the payment of renewal fines on the death of each of the lives mentioned in the leases. Prior to the vesting all the lives in both leases had failed, but no renewals or fee farm conversion grants had been obtained by the vendor. On the allocation of the purchase money the Earl of S., to whom the renewal fines would have been payable, claimed to be entitled to recover the arrears of such fines out of the funds in Court. *Held*, that C., having failed to obtain renewals of the leases, was not "a person having power to sell" within the meaning of section 8 of the Northern Ireland Land Act, 1925. And *Held*, nevertheless, that as the Earl of S. had allowed the sale to go through on the basis that C. should acquire the estate claimed, by discharging the liabilities incident to such acquisition, he was entitled to be recouped in respect of the fines which would have been payable if renewals of the leases had been granted. *Crowe's Estate.*

[JUD. COMMR. 147

LAND PURCHASE—STANDARD PURCHASE ANNUITIES—*Fixing rent by agreement—Period when fixed—Date of agreement, or of its being filed—Northern Ireland Land Act, 1925 (15 & 16 Geo. 5, c. 34), Sched. III.* A number of holdings on the estate of G. were subject to judicial rents which had been fixed by agreements which were entered into before 15th August, 1911, and filed in the Irish Land Commission after that date. By virtue of Sched. III to the Northern Land Act, 1925, judicial rents fixed after 15th August, 1911, are deemed to be third term judicial rents, and the standard purchase annuities of the holdings are calculated accordingly. When the estate was about to become vested in the Land Purchase Commission, the holdings in question were described in the provisional list as being subject to third term judicial rents. The tenants affected objected to their holdings being so described. *Held*, that the dates upon which the agreements were signed were the dates upon which the rents were fixed, and accordingly the tenancies should have been treated as being subject to second term judicial rents. *Church v. M'Poyle* [22 I.L.T.R. 85] applied. *Graham's Estate.*

[JUD. COMMR. 155

LAND PURCHASE—Standard purchase annuities—*Judicial and non-judicial tenancies—Judicial rents—Reduced rents accepted by landlord for long period—Tenancies described in provisional list as being non-judicial and subject to the reduced rents—Objection by owner—Northern Ireland Land Act, 1925 (15 & 16 Geo. 5, c. 34).* The owner of an estate (to the holdings in which the Northern Ireland Land Act, 1925, applied) had, since about the year 1910, allowed the tenants on his estate abatements of 15 per cent. of their rents. In the particulars served by the owner under Section 17 of the Act some of the tenancies were stated to be subject to judicial rents and the remainder were described as non-judicial. The rents set out in the particulars were, in the case of the judicial tenancies (the statutory terms having expired) the judicial rents fixed by the Land Commission or by agreements filed, while in the case of the non-judicial tenancies the rents were some 15 per cent. more than the actual payments normally made by the tenants. The Land Commission in preparing the provisional list did not accept these particulars, and all the tenancies were therein described as non-judicial, and as being subject to rents which were 15 per cent. less than those set out in the owner's particulars. *Held*, that as there had been no binding agreements to accept reduced rents, the rents set out in the provisional list should be amended so as to agree with the particulars furnished by the owner. *Richard's Estate.*

[Jud. Commr. 3

LAND PURCHASE — Tenanted land—*Residential holding—Object of letting—How determined—Northern Ireland Land Act, 1925 (15 & 16 Geo. 5, c. 34), s. 8.* In the year 1915 W. obtained a lease of C. Castle and lands which had previously been let as demesne lands. When the estate of M. C. vested in the Land Purchase Commission under the provisions of the Northern Ireland Land Act, 1925, the owners objected to the inclusion of W's. holding in the provisional list on the ground that the main object of the letting was for a residence. The owners contended that, from their point of view, the premises were let to W. in 1915 for a residence. On the other hand W. satisfied the Court that his object in taking the lease was to use the castle and lands as a farm. *Held* (by Megaw K.C., Judicial Commissioner), disallowing the objection, that it is not the character or description of the holding but the main object of the letting which must guide the Court, and that the object which the tenant had in view, when taking the premises, is a very important factor. *Moonan v. Conyngham* [1895] 2 I.R. 1, applied. *Estate of Crommelin and Another.*

[Jud. Commr. 126

LAND PURCHASE—Tithe rentcharge—*Redemption of—Consent of Treasury—Necessity for—Land Law (Ireland) Act, 1887 (50 & 51 Vict., c. 33) s. 15 (2), s. 16—Land Law (Ireland) Act, 1896 (59 & 60 Vict., c. 47) s. 31 (3), (5), (8), s. 37—Tithe Rentcharge (Ireland) Act, 1900 (63 & 64 Vict., c. 58) s. 3, s. 9—Irish Land Act, 1903 (3 Ed. 7, c. 37) s. 64, s. 98—Northern Ireland Land Act, 1925 (15 & 16 Geo. 5, c. 34).* The estate of G., which, vested in the Land Purchase Commission by virtue of the Northern Ireland Land Act, 1925, was subject to two ecclesiastical tithe rentcharges. The vendor served notice of motion to redeem these charges, and the redemption price was fixed by the Judicial Commissioner at 19 years' purchase in each case, the Ministry of Finance objecting. *Held* (by the Court of Appeal), that ecclesiastical tithe rentcharges cannot be redeemed under the Land Purchase Acts without the consent of the Ministry of Finance as representing the Treasury. *Estate of Gunning.*

[Jud. Commr. 61

LEASE OF PREMISES—Additional rent *in respect of breaches of covenant of varying importance—Penalty or Liquidated Damages—Measure of Damages.* A lease provided that on breach of any of certain covenants the lessees should forfeit and pay unto the lessor a further additional rent or sum of fifty pounds sterling. The trial judge, Moore L.C.J., decided that this additional yearly rent was not in reality rent, but was in the nature of a penalty; and taking as the measure of the damages the injury to the reversion, he assessed the damages at the sum of one shilling. *Held*, by the Court

of Appeal (Andrews and Best L.JJ.), affirming Moore L.C.J., that the additional rent was in the nature of a penalty, and that the damages had been assessed on a proper basis. *Bradshaw* v. *Lemon.*

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MINES AND MINERALS—RESERVATION OF—*Upper basalt—Stone—Irish Land Act, 1903 (3 Ed. VII, c. 37), s. 13 (3), s. 99—Northern Ireland Land Act, 1925 (15 & 16 Geo. V, c. 34), s. 16 (1), (2).* The owners of the W. Estate applied to the Land Purchase Commission, under section 16 of the Northern Ireland Land Act, 1925, for an order that on the vesting of the holdings in the Land Purchase Commission, certain mines and minerals, including *inter alia* upper basalt, limestone, and lithomarge, should be excepted. The Land Purchase Commission made an order excepting limestone and lithomarge, but they did not except upper basalt. Upon the estate there are substantial deposits of upper basalt of considerable value. Until 1911 one of the basalt quarries had been worked, and materials in considerable quantities were raised therefrom and sold to various public bodies for ashlar facings, for wharves and piers, and for square setts. The working of the quarries was interrupted by the death of the owner of the estate in 1911, and also by the financial stringency and restrictions which resulted from the war. At present the working of the quarries could not be carried on profitably, but from the evidence before the Land Purchase Commission it appeared that there was a reasonable probability of the mines being worked within a few years. The owners appealed from the order of the Land Purchase Commission in so far as upper basalt was not excepted, and there was no appeal from the order excepting limestone and lithomarge. *Held, by the Court of Appeal* (Andrews and Best, L.JJ.) that upper basalt is a mineral within the meaning of the Acts of 1903 and 1925, that the rights in relation to the basalt possess a substantial value, actual or potential, and that there is a reasonable prospect of the mines of minerals to which such rights relate being worked or developed within twenty years. *Estate of R. P. Woodside and Others.*

[C.A. 75

NAVIGATION *of rivers and lakes*—DRAINAGE — AWARDS *made under statutory powers for the promotion of the drainage of lands and the improvement of navigation—Works of navigation—Liability for maintenance of works—Construction of statute and award long acquiesced in—5 & 6 Vic., c. 89, sects. 3, 4, 8, 53, 54, 56, 106, 119, 120, 159; 18 & 19 Vic., c. 110, sects. 5, 14; 19 & 20 Vic., c. 62, sects. 1-5, 15, 24, 25, 26, 29.* In the year 1788, the predecessors in title of the plaintiff erected a pier at "B" on Lough N. to facilitate the work of loading and unloading lighters. In 1858, under statutory authority, the water level of Lough N. was lowered, the pier was extended, and the approaches by water to the pier were dredged. In Schedule B to an award made under statutory authority in 1859 and entitled "Navigation undertaken in connection with drainage" were set out the works executed in the district of Lough N. which were to be maintained as works of navigation. No mention was made in this award of the pier or the approaches thereto. In Schedule B to a second award made in the same year, were set out the several works which had been completed for the drainage and improvement of lands within the district of Lough N., including works of navigation and works in connection therewith. In Schedule B (a) to this award were set out the works for the maintenance whereof as works of drainage, trustees were to be appointed. Amongst the works specified in Schedule B as having been completed were the extension of the pier, and dredging the approaches thereto. No reference to these works was contained in Schedule B (a). The navigation and works belonging thereto in that portion of Lough N. in which the pier at "B" is situate

are now vested in the defendants, who were incorporated under the provisions of 19 & 20 Vic., c. 62. The defendants until 1911 carried out the necessary dredging operations, but in that year they ceased to do so, and have since repudiated all liability therefor on the ground that the navigation award contained no reference to same. In an action by the plaintiff against the trustees for a declaration that they were liable to keep the entrance to the pier in a navigable condition :—*Held* by the Court of Appeal (Andrews and Best L.J.J.), reversing the judgment of Brown J., that the defendants were liable to maintain the pier and approaches thereto in a proper and effective navigable condition. Where there is a doubt as to the meaning of a statute or an award made thereunder, a construction placed thereon and long acquiesced in by all parties will not be departed from. *Gaussen v. The Lower Bann Navigation Trustees.*

[C.A. 11

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POLICY OF INSURANCE—DONATIO MORTIS CAUSA—DELIVERY. J. N. took out a policy of life insurance on her own life, with the defendant company on 1st March, 1926, payable on the expiration of 15 years or on her death, whichever event should first happen. The plaintiff is the wife of the defendant T. J. N., and the mother of J. N. Evidence was given by the plaintiff which tended to show an intention on the part of J. N. that her mother should be the beneficiary of the policy. About the end of January, 1928, she told her mother that she had intended to bring her policy to her and leave it for her, and she added that she took it out for her. She afterwards said that she would leave the policy with a niece of her mother's, and that her mother could get it from her. Her mother was, however, shortly afterwards compelled to go to the infirmary, and never received the policy. Evidence was given by two other witnesses corroborating the mother's testimony. J. N. went into the sanatorium on 27th February, 1928. On the previous day, according to the evidence of one of the witnesses for the plaintiff, J. N. gave her her handbag, which contained her insurance book and policy. There was also money amounting to over £5 in the handbag, and J. N. told her to use it to pay some bills of her's (J. N's.) and the insurance premiums. J. N. told this witness that what she gave her was for her mother, and the witness said she would give them to the mother. Owing to the plaintiff being in the infirmary, the witness kept them under lock and key in her own box. She kept the money to pay the insurance premiums and anything else J. N. might want. She also paid the bills, and ultimately gave the receipts to the plaintiff. J. N. died on 18th May, 1928. The County Court Judge of Armagh decided that the gift to the plaintiff of the policy of life insurance constituted a valid donatio mortis causâ. On appeal to the Armagh County Assizes it was *Held*, by Andrews L.J., that all the essential conditions of a valid and effectual donatio mortis causâ had been established, that the decision of the County Court Judge was right, and that the appeal must be dismissed with costs. *Nelson v. Prudential Assurance Company, Limited, and Nelson.*

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PRACTICE — LIMITED ADMINISTRATION—*Grant for the purpose of transferring the legal estate, and without citing the next of kin.* Three new trustees of a will had been appointed in 1875, and the trust estate vested in them. Two of these trustees died prior to 1907, and the third, R. K. E., being desirous of retiring from the trust, R. S. C. and W. C. were in that year appointed new trustees. This appointment was subsequently discovered to be invalid. The legal estate was never divested from R. K. E., who died intestate in the United

States in 1915, and no representation had been raised to his estate. The Court of Appeal (Andrews and Best, L.JJ.), reversing the order of Wilson J., gave liberty to a person, who represented some of the beneficiaries, to apply for a grant limited to conveying the legal estate and without citing the next of kin. *In the Goods of Robert Kerr Eccles, Deceased.*

[C.A. 58

PRACTICE—NEW TRIAL — *Verdict against evidence—Questions for the jury—Requisitions—Omission to apply for direction—Discretion of Court—Married woman trader — Execution against husband—Report of judge—Special bailiffs — Residence within county—27 & 28 Vict., c. 99, s. 5—34 & 35 Vict., c. 99, ss. 5, 6, 7.* The plainiff E. D. brought an action for trespass and for illegal seizure of her stock and furniture. The defendants contended that the goods and chattels seized were the property not of the plaintiff but of her husband, against whom a civil bill decree had been made. The plaintiff pleaded, inter alia, that the sheriff's warrant was invalid as special bailiffs could not execute a decree outside the county in which they reside. Evidence was given at the trial that from the year 1917 the plaintiff's husband carried on a drapery business, that he failed and was evicted, and that his business was sold in 1926. Subsequently in the same year the plaintiff took a letting of the premises upon and in which the alleged trespass and illegal seizure took place. The plaintiff declared that the furniture seized was purchased by her after her marriage with money she got from her mother. One of the special bailiffs called for the defence stated that the plaintiff said at the time of a seizure at her husband's premises in 1926 that the furniture belonged to her brother-in-law. The plaintiff said that money to start her business was given to her by her brother and sisters. She took out a licence for the sale of tobacco in her own name, and sold sweets, tobacco and groceries in a small way. She ordered the goods herself, and her name was over the door of the premises. Invoices for cigarettes to Messrs. D. & Co. were put in evidence and a bill-head of D. & Co. As to these documents, the plaintiff said that her sister was in partnership with her. The only issue submitted to the jury, apart from the question as to damage, was, "Was the furniture seized the property of the plaintiff." To this question the jury answered "No." It was contended on behalf of the plaintiff in the Court of Appeal that the term "furniture" was intended to include stock-in-trade. The trial judge in his report stated that he was disappointed in the verdict. On motion for a new trial: *Held*, by the Court of Appeal (Andrews and Best, L.JJ.), (a) that the verdict of the jury, that the furniture seized was not the property of the plaintiff, must be set aside as being against the evidence. *Held* further (b) that the omission of the plaintiff to ask the judge at the trial to direct a verdict for the plaintiff, on the ground that the sheriff's warrant under which the entry was made and the seizure effected was invalid, as the special bailiffs appointed were not competent to act as such bailiffs and could not execute a decree outside the county in which they resided, did not preclude the Court of Appeal from entertaining that question, and that in the circumstances the Court of Appeal, under Order xxxix, r. 7, might order judgment to be entered for the plaintiff on that ground notwithstanding such omission, *Banbury v. Bank of Montreal* [1918] A.C. 626 followed. *Held*, also (c) that the questions submitted to the jury did not try all the issues. *Held*, also (d), that the plaintiff was entitled to judgment on the issue of trespass. The judgment entered for the defendants was set aside, and a new trial was directed in respect of the illegal seizure. Judgment was entered for plaintiff on the issue of trespass. *Devine v. Carson & Co. (Belfast), Ltd.*

[C.A. 26

PRACTICE—SECURITY FOR COSTS—*Plaintiffs resident in Irish Free State—R.S.C., 1905, Order 29, r. 1—Judgments Extension Act, 1868 (31 & 32 Vict., c. 54).* Application on behalf of defendants resident in Northern Ireland that plaintiffs, who resided in the Irish Free State, might be ordered to give security for costs on the ground that in the event of defendants obtaining judgment, they would be unable to have it extended in the Irish Free State, as the Judgments

Extensions Act, 1868, no longer applied to that country. *Held* by Moore, L.C.J., that plaintiffs must give security for costs. *Wakely v. The Triump Cycle Company, Limited* [1924] 1 K.B. 214 followed. *Callan and Another v. M'Kenna and Another.*
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PUBLIC ELEMENTARY SCHOOL —TRANSFER *to local education authority—Power of majority of trustees to bind minority—Religious instruction in schools—Education Act (Northern Ireland), 1923 (13 & 14 Geo. 5, c. 21) —Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 67).* The managers and a majority of the trustees of B. Public Elementary Schools decided that the schools should be transferred to the County Council of L. under the provisions of the Education Act (Northern Ireland), 1923. Four trustees refused to join in the necessary deed of conveyance. *Held* that the majority of the trustees could require the minority to join in the deed for the purpose of transferring the schools under the Act. And *Held* that the provisions of the Education Act (Northern Ireland), 1923, which relate to the transfer of schools, are not void under Section 5 of the Government of Ireland Act, 1920. *County Council of Londonderry v. McGlade and Others.*
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PUBLIC HEALTH—PUBLIC HEALTH (IRELAND) ACT, *1878 (41 & 42 Vic., c. 52), s. 2;* PUBLIC HEALTH ACTS AMENDMENT ACT, *1890 (53 & 54 Vic., c. 59, s. 19—"Single private drain or sewer."* The plaintiff brought a civil bill for damages sustained by her by reason of the negligence of the defendants in failing to keep in a proper state certain drains and sewers situate at the rear of her premises and vested in the defendants. The county court judge held in plaintiff's favour and assessed the damages at a sum of two pounds. The defendants appealed to the judge of assize. The alleged sewer runs at the rere of a number of houses, and there is a gully in each of the yards at the back of each house into which surface water thrown from the house finds its way and thence passes into the alleged sewer. Part of this sewer became choked with matter in 1928. As the defendants did not clean it out, the plaintiff employed a contractor to do this work. This contractor, giving evidence on behalf of the plaintiff, stated that some years ago he was employed by the then sanitary authority, the predecessors of the defendants, to put a gully trap in the yard of one of these houses. The judge of assize stated a case for the opinion of the Court of Appeal. *Held*, by the Court of Appeal (Moore, L.C.J., and Best, L.J.) that the alleged "sewer" is not a "sewer" vested in the sanitary authority under section 2 of the Public Health (Ireland) Act, 1878 (41 & 42 Vic., c. 52), but is a "single private drain" under section 19 of the Public Health Acts Amendment Act, 1890 (53 & 54 Vic., c. 59). *Sweeney v. Lisnaskea Rural District Council.*
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